4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 260.

SOUTHERN WISCONSIN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF MADISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 12, 1914.

(24,397)

(24,397)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1915.

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1 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

Petition for Writ of Error.

Now comes the Southern Wisconsin Railway Company, a corporation, the plaintiff in error herein, and respectfully shows:

That on the 17th day of March, 1914, this court entered a final judgment herein in favor of the defendant in error and against the plaintiff in error; that in such judgment and in the proceedings had prior thereto in this cause certain errors were permitted to the prejudice of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in its behalf out of the Supreme Court of the United States for the correction of the said errors filed herein with this petition and so complained of, and an order fixing the amount of a supersedeas bond, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

JONES & SCHUBRING,
Attorneys for Plaintiff in Error.

2 Let the writ of error issue upon the execution of a bond by the Southern Wisconsin Railway Company to City of Madison in the sum of ten thousand dollars, ($10,000), such bond when approved to act as a supersedeas.

Dated this 9th day of September, 1914.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice, Supreme Court,
State of Wisconsin.

[Endorsed:] Original copy. State of Wisconsin, Supreme Court, —— County. City of Madison, Plaintiff and defendant in error, vs. Southern Wisconsin Ry. Co., Defendant and plaintiff in error. Assignment and Prayer. Service of a copy of the within —— is admitted this — day of ——, 19—. —— —— Attorney for ——. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for Southern Wis. Ry. Co. Filed Sep. 9, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

3 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

Order Allowing Writ of Error.

This 9th day of Sept., 1914, came the plaintiff in error by its attorneys and filed herein and presented to the court its petition praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow a writ of error upon the plaintiff in error giving a bond according to law in the sum of Ten thousand Dollars which bond shall stay execution upon the judgment herein.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice Supreme Court,
State of Wisconsin.

3½ [Endorsed:] Original copy. State of Wisconsin, Supreme Court, —— County. City of Madison, Plaintiff and defendant in error, vs. Southern Wisconsin Ry. Co., Defendant and plaintiff in error. Order Allowing Writ of Error. Service of a copy of the within —— is admitted this — day of ——, 19—. —— ——, Attorney for —— ——. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for So. Wis. Ry. Co. Filed Sep. 9, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

4 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between said City of Madison, plaintiff, and Southern Wisconsin Railway Company, a corporation, defendant, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, to-wit, an ordinance passed by the City of Madison, a municipal corporation, on the ground that said ordinance was repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute or ordinance; a manifest error has happened, to the great damage of the said Southern Wisconsin Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judg-
5 ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 9th day of September, in the year of our Lord one thousand nine hundred and fourteen.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLY, *Clerk*,
By FRED W. FRENCH,
Deputy Clerk District Court of the United States for the Western District of Wisconsin.

Allowed, September 9th, 1914.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice Supreme Court of Wisconsin.

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

[Endorsed:] Original Copy. State of Wisconsin. Supreme Court, —— County. City of Madison, Plaintiff and defendant in error, vs. Southern Wisconsin Ry. Co., Defendant and plaintiff in error. Writ of Error. Filed Sep. 9, 1914, Clarence Kellogg, Clerk of the Supreme Court. Wis. Service of a copy of the within —— is admitted this — day of ——, —. —— ——. Attorney for —— ——. Jones & Schubring, Badger Block, Madison Wisconsin. Attorneys for So. Wis. Ry. Co.

6 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Madison:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Wisconsin, wherein Southern Wisconsin Railway Company is plaintiff in error and you are defendant in error, to show cause if any there be why the judgment rendered in this cause against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Wisconsin this 9th day of September, 1914.

JNO. B. WINSLOW,
Chief Justice Supreme Court, State of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court, State of Wisconsin.

7 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

MADISON, WISCONSIN, Sept. 9th, 1914.

I the attorney of record for the defendant in error in the above entitled action hereby acknowledge due service of the foregoing and attached citation.

WILLIAM RYAN,
Attorney for City of Madison.

[Endorsed:] Original Copy. State of Wisconsin, Supreme Court —— County. City of Madison, Plaintiff and Defendant in error, vs. Southern Wisconsin Ry. Co., Defendant and Plaintiff in error. Citation. Service of a copy of the within —— is admitted this — day of ——, 19—. —— —— Attorney for Jones & Schubring, Badger Block, Madison, Wisconsin. —— —— Attorneys for So. Wis. Ry. Co. Filed Sep. 9, 1914, Clarence Kellogg, Clerk of Supreme Court, Wis.

8 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court of the United States.

Bond.

Know all men by these presents that we Southern Wisconsin Railway Company as principal, and The New Amsterdam Casualty Company as surety, are held and firmly bound unto the City of Madison in the sum of Ten Thousand Dollars ($10,000), to be paid to the said City of Madison, to which payment, well and truly to be made, we bind ourselves, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 12th day of September, A. D. 1914.

Whereas the above named plaintiff in error seeks to prosecute its

writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Wisconsin,

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged against it if it fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] SOUTHERN WISCONSIN RAILWAY COMPANY,
By DUDLEY MONTGOMERY,
Vice-President.
WARREN MONTGOMERY, *Secretary.*

9 [SEAL.] THE NEW AMSTERDAM CASUALTY COMPANY,
By JOSEPH H. McGINN, *Attorney in Fact.*

Witness:
E. FRANKENSTEIN.

Bond approved and the same shall operate as a supersedeas.

[Seal Supreme Court of Wisconsin.]

JOHN B. WINSLOW,
Chief Justice Supreme Court, State of Wisconsin.

10 State of Wisconsin,
Department of Insurance.

This is to Certify, that the New Amsterdam Casualty Company of New York, New York, has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1914, until the twenty-eighth day of February, 1915, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 2nd day of March, 1914.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

No. 27.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the New Amsterdam Casualty Company of New York, New York, *Company* and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 3rd day of September, A. D. 1914.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

Form 69.

11

Power of Attorney.

New Amsterdam Casualty Company,
Surety Department, Baltimore, Md.

Know all men by these presents:

That the New Amsterdam Casualty Company, by A. M. Bowen, Jr., its Vice President and B. L. Henderson its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company, at a meeting of that body held on the 28th day of May, 1913, a copy of which is hereto attached, does hereby nominate, constitute and appoint Joseph H. McGinn its true and lawful agent and attorney-in-Fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed any and all bonds or undertakings of suretyship in penalty not exceeding the sum of ten thousand ($10,000.00) dollars in any one case.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company, at the office of the Company, in New York City, New York, in their own proper persons.

In witness whereof, the said A. M. Bowen, Jr., Vice President, and B. L. Henderson, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said New Amsterdam Casualty Company, this eighth day of September, A. D., 1914.

A. M. BOWEN, JR.,
Vice President.

Attest:
[SEAL.] B. L. HENDERSON,
Assistant Secretary.

At a meeting of the Board of Directors of the New Amsterdam Casualty Company, held at its office in the City of New York, State of New York on the 28th day of May, 1913, the following resolution was unanimously adopted, to wit:—

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

I, B. L. Henderson, Assistant Secretary of the New Amsterdam Casualty Company, hereby certify that the aforegoing is a true copy taken from the records of Proceedings of the Board of Directors of the New Amsterdam Casualty Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the New Amsterdam Casualty Company, this 8th day of September A. D., 1914.

[SEAL.]

B. L. HENDERSON,
Assistant Secretary.

CITY OF BALTIMORE,
State of Maryland, ss:

On this 8th day of September A. D. 1914, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came A. M. Bowen, Jr. Vice President, and B. L. Henderson, Assistant Secretary of the New Amsterdam Casualty Company, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Company.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[SEAL.]

GEO. E. ZAINS,
Notary Public.

My commission expires May 2, 1916.

12 [Endorsed:] Copy. State of Wisconsin. In Supreme Court. —— County. City of Madison, plaintiff and defendant in error, vs. Southern Wisconsin Railway Company, Defendant and Plaintiff in Error. Bond. Filed Sep. 12, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for So. Wis. Ry. Co.

13 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

Assignment of Errors.

Now comes the above named defendant, Southern Wisconsin Railway Company as plaintiff in error and files herewith its petition for

a writ of error, and says that there are errors in the record and in the proceedings in this case as de*det*mined by the Supreme Court of Wisconsin, the court of last resort in said state, and for the purpose of having said errors reviewed by the Supreme Court of the United States, makes the following assignment:

The Supreme Court of the State of Wisconsin erred in holding that an ordinance adopted by the City of Madison on June 10, 1910, requiring the plaintiff in error to do the paving in question was valid.

The validity of said ordinance was denied and drawn in question by the defendant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Wisconsin erred in holding and deciding, First, that said ordinance dated June 10, 1910, requiring the defendant to do the paving in question did not impair the obligation of the contract between the City of Madison and this defendant evidenced by its franchise passed June 10, 1892—contrary to the provisions of the Federal Constitution, Article 1, Section 10.

14 Second, that said ordinance of June 10, 1910, requiring the defendant to do the paving in question did not deprive the defendant of property without due process of law—contrary to the provisions of the Federal Constitution, Fifth Amendment.

For which errors the defendant Southern Wisconsin Railway Company prays that the judgment of the Supreme Court of the State of Wisconsin dated March 17, 1914, be reversed, and a judgment rendered in favor of the Company, and for costs.

JONES & SCHUBRING,
Attorneys for Plaintiff in Error.

15 [Endorsed:] Original Copy. State of Wisconsin. Supreme Court —— County. City of Madison, Plaintiff and Defendant in Error, vs. Southern Wisconsin Ry. Co., Defendant and Plaintiff in Error. Assignment of Errors. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for So. Wis. Ry. Co. Filed Sep. 9, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

16 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

Certificate of Lodgement.

SUPREME COURT, STATE OF WISCONSIN, *ss:*

I, Clarence Kellogg, Clerk of said Supreme Court, do hereby certify that there was lodged with me as such clerk on the 9th day of Sept., 1914, in the matter of City of Madison, plaintiff and defendant in error v. Southern Wisconsin Railway Company, a corporation, defendant and plaintiff in error, the following:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for the said defendant in error, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Madison, Wisconsin, this 9th day of Sept., 1914.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court, State of Wisconsin.

17 [Endorsed:] Original Copy. State of Wisconsin. Supreme Court —— County. City of Madison, Plaintiff and Defendant in Error, vs. Southern Wisconsin Railway Co., Defendant and Plaintiff in Error. Certificate of Lodgement. Filed Sep. 9, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for So. Wis. Ry. Co.

18 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Appellant.

Appeal on Writ of Error to Supreme Court of the United States.

It is hereby stipulated by and between the above named parties by their respective attorneys that on the appeal by writ of error by

Southern Wisconsin Railway Company to the United States Supreme Court from the decision rendered herein by the Supreme Court of the State of Wisconsin, that the Clerk return to the United States Supreme Court the entire record in said case, except the following:

1. Exhibits 1 to 5 inclusive shall not be sent up.
2. Copies of Exhibits 6 and 7 shall be sent up.

WILLIAM RYAN,
Attorneys for Plaintiff.
JONES & SCHUBRING,
Attorneys for Defendant.

Dated Sept. 21st, 1914.

19 [Endorsed:] Original Copy. State of Wisconsin. Supreme Court. City of Madison, Plaintiff and Respondent, vs. Southern Wisconsin Railway Company, Defendant and Appellant. Stipulation. Jones & Schubring, Badger Block, Madison, Wisconsin, Defendant's Attorneys. Filed Sep. 22, 1914. Clarence Kellogg, Clerk of Supreme Court, Wis.

20 STATE OF WISCONSIN:

In Supreme Court.

CITY OF MADISON, Plaintiff and Defendant in Error,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant and Plaintiff in Error.

In Error to Supreme Court, State of Wisconsin.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Wisconsin, ss:

In obedience to the commands of the within writ I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case with all things concerning the same.

In witness whereof I have hereunto set my hand and affixed the seal of said Supreme Court of Wisconsin in the City of Madison this 1st day of Oct. 1914.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk Supreme Court, State of Wisconsin.

21 [Endorsed:] Original Copy. State of Wisconsin. Supreme Court —— County. City of Madison, Plaintiff and Defendant in Error, vs. Southern Wisconsin Ry. Co., Defendant and Plaintiff in Error. Return to Writ. Jones & Schubring, Badger Block, Madison, Wisconsin, Attorneys for So. Wis. Ry. Co.

22 Pleas Before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State, on the second Tuesday, to-wit, the thirteenth day of January, A. D. 1914.

Present:

Hon. John B. Winslow, Chief Justice.
Hon. Roujet D. Marshall,
Hon. Robert G. Siebecker,
Hon. James C. Kerwin,
Hon. William H. Timlin,
Hon. John Barnes, and
Hon. Aad John Vinje,
Justices.

CLARENCE KELLOGG, *Clerk.*

Be it remembered that heretofore, to-wit on the 28th day of July, in the year of Our Lord One Thousand Nine Hundred and Thirteen came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Southern Wisconsin Railway Company, by its attorneys and filed in said court its certain Notice of Appeal and Undertaking, according to the statute in such case made and provided, and also the return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

23 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

To William Ryan and John Moran, of Counsel, Attorneys for Plaintiff and N. P. Stenjem, Clerk of the Circuit Court:

Please take notice that the above named defendant Southern Wisconsin Railway Company hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered by the above named court herein, and entered on the 14th day of April A. D. 1913, in favor of the plaintiff and against the defendant for the sum of $4,499.08 damages and $68.56 costs, and from the whole thereof.

Dated April 30, 1913.

JONES & SCHUBRING,
Attorneys for Defendant.

24 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

Whereas on the 14th day of April, A. D. 1913, in the Circuit Court within and for the County of Dane, the above named plaintiff recovered a judgment against the above named defendant for $4,499.08, damages and $68.56, costs.

And the above named defendant Southern Wisconsin Railway Company feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin,

Now therefore Massachusetts Bonding & Insurance Company of Boston, Mass., duly licensed to do business in the State of Wisconsin do hereby pursuant to the Statute in such case made and provided undertake that the said defendant and appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding $250.00, and do also undertake that if the said judgment so appealed from or any part thereof be affirmed that said appellant will pay the amount directed to be paid by said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on said appeal.

MASSACHUSETTS BONDING & INSURANCE COMPANY,
By CHRIS. SCHROEDER, *Att'y in Fact.*
[SEAL.]

R. A. BOERS.

Dated July 24th, 1913.

25 State of Wisconsin,
Department of Insurance.

This is to Certify, that the Massachusetts Bonding & Ins. Co., of Boston, Massachusetts, has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1913, until the twenty-eighth day of February, 1914, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this 1st day of March 1913.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

No. 14.

I, Herman L. Ekern, Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy

with the original certificate of authority, issued to the Massachusetts Bonding & Ins. Co. of Boston, Massachusetts, and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 11th day of July, A. D. 1913.

[SEAL.] HERMAN L. EKERN,
Commissioner of Insurance.

Form 69.

26 *Authenticated Copy of Power of Attorney.*

This power of attorney cancels and revokes all authority conferred upon the said agents or attorneys in fact, prior to the date hereof.

Know all men by these presents:

That, Massachusetts Bonding and Insurance Company, a body corporate, duly incorporated under the laws of the Commonwealth of Massachusetts, and having its principal office in Boston, Mass., doth hereby constitute and appoint Christian Schroeder and Walter Schroeder, of the City of Milwaukee, County of Milwaukee and state of Wisconsin to be its true and lawful attorneys in and for the State of Wisconsin, for the following purposes, to-wit:

That the said Christian Schroeder or Walter Schroeder, individually, as Attorneys in Fact, be and they are hereby fully authorized and empowered to sign the name of the Company as Surety, and for it and in its name, place and stead, to do and perform, in the state of Wisconsin any and all acts and things set forth in the resolution of the Board of Directors of the said Massachusetts Bonding and Insurance Company, a certified copy of which appears on the reverse side hereof and is made a part of this power of Attorney.

It being the intention of this power of Attorney to fully authorize and empower the said Attorneys in Fact to sign the name of said Company, and affix its corporate seal, as Surety, to any and all of said bonds, and thereby lawfully bind it as fully, to all intents and purposes, as if done by the duly authorized officers of said company, with the seal of said Company thereto affixed and the said company hereby ratifies and confirms all and whatsoever the said Attorneys in Fact may lawfully do in the premises by virtue of these presents.

Provided, however, that this power of Attorney does not authorize, or empower, the said attorneys in fact to give consent to any alterations or changes, in terms, conditions, or covenants of said bonds when once executed, nor to any alterations, or changes, in the form or conditions of any contract, on which this company is surety, nor to bind, or in any way commit, the said Massachusetts Bonding & Insurance Company to any course or position whatever
27 regarding adjustment of claims or complaints that may be made thereunder, or in connection with any bond which may be executed by the said Company.

The Massachusetts Bonding and Insurance Company doth hereby constitute and appoint R. C. De Normandie to be its attorney for it,

and in its name, and as, and for its Corporate act and deed, to acknowledge this power of Attorney before any person having authority by the Commonwealth of Massachusetts to take such acknowledgment, to the intent that the same may be duly recorded or filed.

In witness whereof, the said Massachusetts Bonding and Insurance Company, pursuant to a resolution of its Board of Directors, duly passed on the 20th day of November, A. D. 1907, (a certified copy of which appears on the reverse side hereof), has caused these presents to be sealed with its common and corporate seal, duly attested by its Vice President and its Asst. Secretary, this 26th day of February A. D., 1913.

MASSACHUSETTS BONDING AND
INSURANCE COMPANY,
SAMUEL S. PERRY,
Vice President.

[CORPORATE SEAL.]

Attest:
R. C. DE NORMANDIE, *Asst. Sec.*

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

I hereby certify that on this 26th day of February A. D. 1913, before me, the subscriber, a Notary Public for the Commonwealth of Massachusetts, residing in the City of Boston, in said County, personally appeared R. C. De Normandie, the Attorney named in the foregoing Power of Attorney, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said Power of Attorney to be the act of the said Massachusetts Bonding and Insurance Company.

Witness my hand and Notarial Seal the day and year aforesaid.

MARTIN J. COCHRANE,
[NOTORIAL SEAL.] *Notary Public.*

My commission expires Sept. 20, 1918.

28 Be it remembered that,

At a meeting of the Board of Directors of Massachusetts Bonding and Insurance Company, duly called and held on the 20th day of November, 1907, a quorum being present, the following resolution was passed:

"Whereas, It is necessary for the effectual transaction of its business that this Company appoint agents and attorneys with power to act for it and in its name:

Therefore, Be it resolved that this Company do, and its hereby does authorize and empower its President or either of its Vice Presidents, in conjunction with its Secretary or Assistant Secretary, under its corporate seal, to appoint any person or persons as attorney or attorney in fact, or agent, or agents of said Company, in its name, and as its acts, to execute and deliver, any and all contracts guaranteeing the fidelity of persons holdings positions of public or private

trust; guaranteeing the performance of contracts, other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; and

Also, In its name, and as it- attorney or attorneys in fact, or agent or agents, to make, execute, seal and deliver all bonds and undertakings required under Chapter 282 of the Revised Statutes of the United States, entitled "An act relative to recognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon" passed August 13th, 1894; and,

Also, In its name, and as it- attorney or attorneys in fact, or agent or agents, to execute and guarantee the conditions of any and all bonds recognizances, obligations, stipulations, undertakings, or anything in the nature of either of the same, which are or may by law, municipal or otherwise, by any statute of the United States, or of any state in the United States, or by the rules, regulations, customs, practice or discretion of any board, body or organization, office or officer, local, municipal or otherwise, be allowed, required, or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality, or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything, or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation or undertaking, or anything in the nature of either of the same; and

Also, In its name and on its behalf, and as its attorney or attorneys, in fact, agent or agents, to justify on any instrument, hereinbefore described, which shall have been executed by or on behalf of this company, with power to attach thereto the seal of the said Company.

Also, In its name and on its behalf, and as its attorney or attorneys in fact, agent or agents, to ask, demand, receive, collect and receive any and all premiums on any and all contracts of this company coming due and payable in any State, and to give proper acquittances and discharges therefor.

Resolved, Further: That the President or either of the Vice Presidents, in conjunction with the Secretary of this Company, are hereby authorized and empowered to make, execute and deliver on behalf of this company, and in its name, and under its seal, any power or powers of attorney that may be required to carry out the purpose and objects of the foregoing resolution.

I, R. C. Normandie, Asst. Secretary of Massachusetts Bonding and Insurance Company, do hereby certify that the above and
29 foregoing is a full and correct copy of a resolution passed by the Board of Directors, of the said Company, at a regular meeting thereof, duly called and held on the 20th day of November. 1907, a quorum being present, as the same appears on the records of the Company now in my possession and custody as Asst. Secretary.

In witness whereof, I have hereunto set my hand and affixed the

seal of the said Company at the City of Boston, this 26th day of February A. D. 1913.

R. C. DE NORMANDIE,
[SEAL.] *Ass't Secretary.*

Samuel S. Perry, Vice President and R. C. De Normandie, Asst. Secretary, each for himself deposes and says that he is respectively the Vice President and Asst. Secretary of the said Massachusetts Bonding And Insurance Company, and that the above and foregoing is a true and complete copy of Power of Attorney issued to said Christian Schroeder and Walter Schroeder, and that the same is still in full force and effect.

SAMUEL S. PERRY,
Vice President.
R. C. DE NORMANDIE,
Ass't Secretary.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this 26th day of February A. D. 1913, before me appeared Samuel S. Perry and R. C. De Normandie to me personally known, who being severally and duly sworn, said that they resided in the City of Boston, Mass., and that they signed the above declaration as Vice President and Asst. Secretary of the said Massachusetts Bonding and Insurance Company, and that the same is true to the best of their knowledge and belief.

[NOTORIAL SEAL.] MARTIN J. COCHRANE,
Notary Public.

My Commission expires Sept. 20, 1918.

30 (Endorsements:) Original. State of Wisconsin. In Circuit Court for Dane County. City of Madison, a corporation, Plaintiff, vs. Southern Wisconsin Railway Company, Defendant. Notice of Appeal. Service of a copy of the within Notice of Appeal and Bond admitted this 26th day of July, 1913. William Ryan, Attorney for Plaintiff. Nissen P. Stenjem, Clerk of Court. Filed: Circuit Court Dane County, Wis. Jul. 26, 1913. Nissen P. Stenjem, Clerk. Filed: Jul. 28, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

31 STATE OF WISCONSIN:

Circuit Court, Dane County.

CITY OF MADISON, a Municipal Corporation, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, a Corporation,
Defendant.

The State of Wisconsin to the said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend

the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint; of which a copy is herewith served upon you.

JOHN A. AYLWARD,
Plaintiff's Attorney.

P. O. Address, Madison, Dane County, Wis.

32 STATE OF WISCONSIN:

Circuit Court for Dane County.

CITY OF MADISON, a Municipal Corporation, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, a Corporation, Defendant.

The plaintiff above named by John A. Aylward its attorney, complaining of the Southern Wisconsin Railway Company, the defendant herein, for a cause of action respectfully alleges and shows to the court as follows.

That the city of Madison is a municipal corporation organized and existing under the laws of the state of Wisconsin.

That the defendant is a street railway corporation organized and existing under the laws of Wisconsin with its office and principal place of business in the city of Madison, Wisconsin.

That on the 8th day of March, 1884, the plaintiff city gave to the Madison Street Railway Company, organized and doing business under the laws of Madison, a street railway franchise in terms as follows, to-wit:

An Ordinance Conferring Certain Rights and Privileges upon the Madison Street Railway Company.

The common council of the city of Madison do ordain as follows:

Section 1. Authority and permission is hereby granted to the Madison Street Railway Company to lay and maintain a single or double track for a street railway in, over, and upon the streets and bridges of this city and run cars thereon, propelled by any power other than locomotive steam engines, not constituting a public nuisance, with all the necessary switches, curves, turnouts and other appliances and conveniences, upon the express condition that the said company shall construct and have in operation within this city a line of railway extending from the state fair grounds to the east Madison railroad depots, on or before November 1st, A. D. 1885; to Brearly street in the Third ward on or before November 1st, A. D. 1887, and from capitol park to Few street in the second ward, on or before November 1st, A. D. 1888, and shall thereafter at all times during the continuance of this license maintain and operate the same. The authority hereby granted shall, subject to the conditions

and limitations in this ordinance contained, be exclusive for the period of twenty-five years from the passage of this ordinance. Provided, however, that the common council may at any time designate any other line of railway in said city as a line demanded by the public necessities, and in case said company, upon being notified of such designation, shall not within such reasonable time as shall be fixed by the common council, construct and put in operation such line, then the common council may grant to any other company or person the exclusive right to construct and operate a street railway in the street or streets forming the line so designated. And in case the said company shall fail or neglect to construct, complete and thereafter to operate the several lines of railway in this section designated and required to be built over the routes and within
33 the times in said section provided, said company shall forfeit all rights, privileges and franchises under this ordinance and the same shall be null and void and of no effect.

Section 2. Said railway shall be constructed in a good and substantial manner and in accordance with approved plans for the construction of such roads, and so as to obviate as far as possible any obstruction or hindrance to other proper use of said streets and bridges and upon or as near the middle of the streets as may be practicable, and the cars to be run on such railway and the other equipment shall be of the best class and style in use on such railways. And the roadbed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said track at any and all points, and in any and all directions without obstruction; (and in case the common council shall at any time change the actual grade of any street on which their tracks are laid, said company shall immediately upon the completion of such change, relay their tracks to correspond to such grade.) When snow shall be thrown from the railway track it shall be leveled or disposed of by said company so as not to be an obstruction to travel on the street. And said company shall keep the space between the rails and for the distance of one foot on the outer side of the rails — proper repair so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at its own cost and expense.

Section 3. Whenever any street upon which any of said tracks may be located shall hereafter be paved or macadamized, the said railway company shall pave or macadamize the roadbed between and one foot on either side on the outside of the rails of the track of their said road, and shall at all times make and keep the tracks between and one foot on either side on the outside of the rails thereof equally as good as the streets shall be outside of their tracks, and shall correspond in surface and improvements with the said street outside of said track. And it shall be the duty of said company to repair any and all damages done to the streets, macadamizing, curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the streets as herein provided for, and further to protect and save harmless the city of Madison against all claims, for damages arising from the

construction, operation or management of tracks or roads provided for herein.

Section 4. The common council reserves the power to make reasonable regulations respecting the speed of running, and the manner of running and stopping the cars for the safety and convenience of the public, and respecting the frequency of running cars; and also the power to impose a license fee not to exceed $5 per year for each car actually run after the expiration of ten years from the passage of this ordinance, no license to be imposed before the expiration of the said ten years; and to limit the rate of fare to be charged but not to reduce the passenger fare below five cents for a trip over one continuous line or part thereof. The said city of Madison shall not be liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes or other defects in its streets or highways, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or electric wires, or the necessary repairing of the same, or from the im-
34 provement or repairing of any street. The city of Madison hereby reserves to itself and all persons lawfully authorized to do such work in its streets, the right to take up and remove the rails and structure of said road whenever it shall be necessary for the repairs or improvement of the streets, or for laying water or gas pipes or sewers or electric wires, or for other public purposes on the streets on which such rails may be laid, and such repairs, improvements or works shall be made by the city or persons thereto authorized, without unnecessary delay, and doing no unnecessary damage to said track. Said street railway shall be used exclusively as a passenger road, except that passengers thereon may, without extra charge, carry a reasonable amount of hand luggage, and said company may transport thereon all materials for the construction of its road.

Section 5. Should said railway company neglect or refuse to comply with the provisions of this ordinance, or with any regulations imposed by the council, under the powers herein reserved, said company shall be liable to a fine or penalty not exceeding fifty dollars for any one offense, to be recovered by action as other penalties for violation of an ordinance, but the provisions of this section shall not apply to the forfeitures under section one hereof.

Section 6. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken by any car, such team or vehicle shall give way to such car, nor shall any person wilfully obstruct, hinder or interfere with any of such railway cars by placing, driving or stopping any teams, vehicle or other obstacle, in, upon or near the track of said railway after being notified by ringing of the car bell, or otherwise. And whoever shall wilfully violate any of the provisions of this section shall upon conviction thereof, be punished by a fine not exceeding ten dollars, and may be imprisoned in the county jail until said fine is paid, not exceeding thirty days.

Section 7. This ordinance shall be void and all rights granted hereunder shall cease and be of no effect unless said company shall

file a written acceptance of the same with the city clerk within sixty days from the passage hereof.

Section 8. This ordinance shall take effect and be in force from and after its first passage and publication.

JAMES CONKLIN, *Mayor.*

Notice is hereby given that the foregoing ordinance was passed by the common council of the city of Madison, Wis., on the 8th day of March, A. D. 1884.

JOHN CORSCOT,
City Clerk.

(Ordinance No. 842.)

That as plaintiff is informed in pursuance of said franchise the Madison Street Railway Company duly accepted the same proceeded to construct the line of street railway provided for in said franchise and more particularly that portion upon University avenue between Charter and Park streets hereinafter referred to.

That on February 26, 1889, the Madison City Railway
35 Company, being a street railway company organized under the laws of Wisconsin doing business in Madison, Wisconsin, having succeeded to the property, rights, franchise, duties and obligations of the Madison Street Railway Company, the plaintiff city gave to the Madison City Railway Company a charter or franchise conferring certain rights, privileges and responsibilities to and upon the Madison City Railway Company in terms as follows to-wit:

Street Railway Franchises.

An Ordinance confirming certain rights and privileges to the Madison City Railway Company, and relating to and extending the time for constructing certain parts of the line, and amendatory of an ordinance entitled, "An ordinance conferring certain rights and privileges upon the Madison Street Railway Company."

The common council of the city of Madison do ordain as follows:

Section 1. All authority, permission, rights, privileges and franchises granted to, or conferred upon, the Madison Street Railway Company by an ordinance entitled, "An ordinance conferring certain rights and privileges upon the Madison Street Railway Company," passed by the common council of the city of Madison, on the 8th day of March, A. D. 1884, are hereby confirmed and assured to the Madison City Railroad Company, and its acquisition thereof is hereby ratified and confirmed, provided, however, that no action or right of action that the city of Madison may have against the Madison Street Railway Company, or its stockholders, shall in any way be affected by this ordinance.

Section 2. The time for constructing and having in operation the line of the railway extending from Capitol park to Few street, in the second ward, as provided in Section 1, of said ordinance, is hereby

enlarged and extended to and until the first day of November, 1889; and the said Madison City Railway Company is hereby granted the exclusive right, privileges and franchises of construction and having in operation the said line on or before the said 1st day of November, 1889, and thereafter maintaining and operating the same for the period of time mentioned in said ordinance; provided, that in case of failure to comply with this section all the aforesaid authority, permission, rights and franchises shall be forfeited and revoked at the option of said city.

Section 3. The said Madison City Railway Company is hereby released from the duty and obligation to construct, maintain, or operate a line of railway extending from the present western terminus of its line at Mills street to the State Fair grounds, as imposed by the aforesaid ordinance; provided, however, that it shall be the duty of said company to construct, maintain and operate a line from its said present western terminus to said Fair grounds, whenever required by said city, upon ninety days' written notice, and that said company shall have the right and privilege to construct, maintain and operate a railway line in, upon and along the streets of said city, as provided in the aforesaid ordinance; in case said company shall fail to comply with any provision of this section, all the aforesaid authority, rights, privileges and franchises shall be forfeited and revoked at the option of said city.

Section 4. The said ordinance passed by the common council of said city on the 8th day of March, A. D. 1884, shall continue in full force and effect except in so far as the same is modified and amended by this ordinance.

36 Approved February 26, 1889.

M. R. DOYON, *Mayor.*

Notice is hereby given that the foregoing ordinance was passed by the common council of the city of Madison on the 26th day of Feb., 1889.

JOHN CORSCOT,
City Clerk.

(Ordinance No. 957.)

An Ordinance granting the use of the streets and bridges for the operation of an electric railway to the Madison City Railway Company.

The common council of the city of Madison do ordain as follows:

Section 1. Be it ordained and enacted by the council of the city of Madison assembled, and it is hereby ordained, that permission is hereby granted to the Madison City Railway Company, its successors and assigns, to enter upon and to construct, maintain and operate a single or double track railway, with the necessary turnouts and switches, upon the streets, highways and bridges in said city, upon the express condition that the said company shall construct and have in operation within four months a line of railway extending from the university buildings via University avenue, Park

street, State street, Carroll street, Main street, King street, Wilson street, Blair street, Williamson street, Jenifer street, to Baldwin street, and also a line from the junction of Bedford street and Main street on Main street via Carroll street, Mifflin street, Hamilton street, Johnson street, to Baldwin street, subject to all general provisions of statute law now in force and applicable thereto, and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact.

Section 2. Said Madison City Railway Company, its successors and assigns, are hereby granted the right to use, upon the whole or any portion of its tracks, as the same are now or may hereafter be authorized and constructed, electricity as a motive power supplied to the cars by means of a single overhead trolley-wire, the electrical circuit being completed by the rails of the road, suitably connected at their ends, or connected with a supplementary ground wire. And for this purpose said company, its successors and assigns, are hereby expressly authorized and empowered to lay and connect said ground circuit as aforesaid, and to erect and maintain, in and along any and all of the public streets and highways upon which the tracks of said company are hereby or may in the future be, authorized and constructed, such posts, brackets, wires and fixtures as may be required to support and maintain the overhead trolley-wire. For such support and maintenance, either horizontal cross-wires extending across the street, or bracket arms projecting over the track as said company may deem more suitable, may be employed. All posts or poles used in such construction shall be number one selected cedar twenty-eight (28) feet in length with not less than seven (7) inch tops, excepting that on the streets around the Capitol building, and within a radius of one-fourth of a mile therefrom, they shall be ornamental iron poles.

37 In all cases of single track construction the poles shall be placed in or adjacent to the line of the curb of the sidewalk, or otherwise in such manner as not unreasonably to impede public travel, and set at least six feet in the ground; and in all cases of double track construction where the tracks are at least six feet apart, the poles shall be placed in the street between such double tracks and set at such a depth in the ground as to make their support substantial and adequate. All poles shall be kept painted, those of wood the first six feet next to the ground line to be black and the balance white, and those of iron shall be all black, or such colors as the council may determine; and the cross wires, or brackets, as the case may be, for the support of the trolley-wire, shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen (18) feet above the surface of the street. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition.

Animal, or other motive power, except steam, may be used, jointly with electrical power, in the general operation of said railway, during such time or times as the operation thereof by electricity shall be interrupted or suspended by reason of accident to the electrical equip-

ment, such animal or other power alone may be employed in the propulsion of cars over the whole or any portion of the company's tracks.

Section 3. The authority and permission herein granted, are subject to the following terms and restrictions:

(A) The track shall be of the standard gauge, four feet and eight and one-half inches, and within a radius of one and one-quarter miles from the center of the Capitol park, shall be constructed with "T" rail of fifty pounds to the yard, laid on ties six by eight inches, placed two feet apart from centers, in a good and substantial manner, upon or as near the middle of the street as may be practicable, so as to obviate as far as possible any obstruction or hindrance to other proper use of said streets and bridges; and outside of said limit of one and one-quarter miles the weight of "T" rails shall not be less than 35 pounds to the yard, laid on ties two feet apart from centers. The cars to be run on said railway, and other equipments, shall be of the best class and style in use in such railways. And the roadbed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said track at any and all points. When snow shall be thrown from the railway tracks it shall be leveled or disposed of by said company so as not to be an obstruction to travel on the street. And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense.

(B) It shall be the duty of said company to repair any and
38 all damages done to the streets, macadamizing curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the streets as herein provided for; and further, to protect and save harmless the city of Madison against all claims for damages arising from the construction, operation or management of the railway provided for herein.

(C) The city reserves the power to impose a license fee not to exceed five ($5) dollars per year for each motor car actually run at the expiration of five years after the passage of this ordinance.

(D) The rate of fare shall be five (5) cents for one continuous ride in any one direction, and the said company, its successors and assigns, shall in no case charge or collect from any passenger more than five (5) cents for one continuous ride between any two points within the city limits; said continuous ride shall include transfer at junction points, provided the passengers so transferred shall take the first car leaving after their arrival in the direction in which they may wish to go. This section is not to be construed to include a round trip, but merely a single trip from one point to another by the shortest and most direct route.

(*D*) The city shall not be liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes or other defects in its streets or highways, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes or electric wires or the necessary repairing of the same, or from

the improvement or repairing of any street. The city further reserves to itself and to all persons lawfully authorized to do such work in its streets the right to take up and remove the rails and structure of said road whenever it shall be necessary for the repairs or improvements of the streets or for laying water or gas pipes or sewers or electric wires, or for other public purposes on the streets on which such rails may be laid; and such repairs, improvements or works shall be made by the city or persons thereto authorized without unnecessary delay, and doing no unnecessary damage to said track, and upon the change or alteration of any grade, the said company, its successors or assigns, shall at its own cost or expense, promptly raise or lower its track or tracks so as to conform to such grade, as changed.

(F) Said city railway shall be used exclusively as a passenger railway, except that passengers thereon may, without extra charge, carry a reasonable amount of hand luggage, and said company may transport thereon all materials for the construction of its road.

(G) The rights and privileges herein granted shall be for a period of forty years from the passage of this ordinance,—the first twenty years of which shall be exclusive,—provided, however, that the common council may at any time designate any other line of railway in said city as a line demanded by the public necessities. And in case said company, being notified of such designation, shall not within such reasonable time as shall be fixed by the common council construct and put in operation such line, then the common council may grant to any other Company or person the exclusive right to
39 construct and operate a street railway, in the street or streets forming the line so designated, but the said city shall not require the railway company or grant to any other company or person the right to build and equip a railway that may run parallel within twelve hundred (1,200) feet of its line or lines which it now has or may hereafter construct for the purpose of carrying passengers.

(H) When it shall be necessary for any person or persons to move across any of the streets or alleys occupied by said company, its successors or assigns, any house or other building of such height or size as to interfere with any of the poles or wires of said company, its successors or assigns, erected or maintained under this ordinance, the said company, its successors or assigns, shall, upon receiving at least twenty-four (24) hours' notice in writing thereof, and at the expense of the owner of such building, temporarily remove its poles and wires so far as necessary to allow the passage of such house or other buildings for a reasonable period of time, not exceeding five (5) hours, and the said company, its successors or assigns, shall be liable for any damages caused by its failure to comply with this provision; provided, that said company shall not be required to keep its poles and wires out of their normal position at any time or times other than between the hours of twelve (12) o'clock midnight and five (5) o'clock a. m. and provided further that the route selected for removing such house or other building shall first be approved by the city engineer.

Section 4. Should said railway company neglect or refuse to comply with the provisions of this ordinance, or with any regulation

imposed by the council, under the powers herein reserved, said company shall be liable to a fine or penalty not exceeding fifty ($50) dollars for any one offense, to be recovered by action as other penalties for violation of an ordinance, but the provision of this section shall not apply to the forfeitures under section one hereof.

Section 5. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken by any car, such team or vehicle, shall give way to such car; nor shall any person wilfully obstruct, hinder or interfere with any of such railway cars by placing driving, or stopping any teams, vehicle or other obstacle in, upon or near the track of said railway after being notified by ringing of the car bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall upon conviction thereof be punished by a fine not exceeding ten ($10) dollars and may be imprisoned in the county jail until said fine is paid, not exceeding thirty days.

Section 6. This ordinance shall be void and all rights granted hereunder shall cease and be of no effect unless said company shall file a written acceptance of the same with the city clerk within sixty days from the passage hereof.

Section 7. All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed.

Section 8. This ordinance shall take effect upon its passage and publication.

Approved June 10th, A. D. 1892.

WM. H. ROGERS, *Mayor.*

Notice is hereby given that the foregoing ordiance was passed by the common council of the city of Madison, Wisconsin, on the 10th day of June, A. D. 1892.

O. S. NORSMAN,
City Clerk.

40 (Ordinance No. 1038.)

That said Madison City Railway accepted said charter and franchise and entered into the possession of the property of the Madison Street Railway Company and assumed its duties, rights, obligations and franchises and operated the said line of railway constructed by the Madison Street Railway Company and especially that portion of University Avenue between Charter and Park Streets in said City.

That later the Madison City Railway Company having succeeded to the property, rights, franchises and duties and responsibilities of the Madison Street Railway Company gave to the Madison City Railway Company its further franchise in the terms as found on page four of this complaint, under date of June 10, 1892, and set forth in folios 22*a* to 43 inclusive.

That the Madison City Railway Company accepted said franchise and the powers, rights, privileges and duties therein contained and of the Madison Street Railway Company continued to

operate its said system of railway especially upon that portion of University Avenue between Charter and Park Streets in said city.

That University Avenue is one of the broad public thoroughfares of said city and the main thoroughfare for the western portion thereof. That the grounds of the University of Wisconsin with many of the buildings thereof lie along the northern and easterly side of said Avenue from Charter to Park Street.

That the defendant company herein has succeeded to all the rights, duties, powers, franchises, duties and responsibilities of the Madison City Railway Company and the Madison Street Railway Company except as modified in said succeeding franchises set forth and was under obligation at the time the plaintiff city ordered the asphalt improvement of said Avenue and at the time the plaintiff city and the defendant company entered into the stipulation and agreement for the improvement of University Avenue and at the time of the passage of the ordinance for the improvement thereof hereinafter referred to and the time of the entry of said stipulation it was the duty of the defendant company to grade and macadamize or pave and repave its rights of way, to-wit the portion occupied by its railway tracks and one foot outside each rail at its own expense and especially that portion of its right of way on University Avenue between Charter and Park Streets in a manner and with the material suitable to the traffic on said street and similar and corresponding to the improvement made thereon by the City of Madison.

The plaintiff further represents that the defendant herein is a street railway corporation organized and existing as such under the laws of Wisconsin and as such railway corporation it is doing business and operating a line of street railway in said city and more particularly upon that portion of University Avenue between Park and Charter streets; said Avenue being one of the principal traveled streets of said city.

That prior to the common council's ordering the improvement in the summer of 1910 of said portion of University Avenue in-
41 cluding the defendant's right of way said street had never been improved with macadam or other permanent improvement and by reason of the fact that University Avenue is one of the principal traveled streets of said city and that a large amount of stone and other heavy material is constantly being hauled on and over said street it had become badly worn out of repair and in a condition almost impossible for public travel.

Prior to 1910 the plaintiff city had surfaced and resurfaced said portions of University Avenue with crushed stone but found said material unsuitable by reason of the large amount of heavy traffic to maintain a proper street with such material.

That prior to the 10th day of July, 1910, the plaintiff city duly decided to grade, improve and to pave said portion of University Avenue between Charter and Park Streets with asphalt pavement of the best material and construction and on said date entered into a contract with the Andrews Asphalt Paving Company for paving University Avenue from Gilman to Charter Street and especially

said portion of said Avenue with asphalt as being the pavement best adapted for the use of said Avenue.

That the right of way of the defendant company had from time to time also been improved with the use of crushed stone and in like manner the same frequently become out of repair and unfit for travel and said right of way so improved was ill adapted and unfit for the kind of traffic on said street and was so at the time the city entered into the improvement of said street with asphalt pavement as aforesaid.

That immediately following the determination of said city to improve said portion of said Avenue with asphalt the defendant company was informed of the city's determination to so improve said portion of said street with asphalt and requested the defendant company to likewise improve its right of way on said avenue that is the portion occupied by its railway track and one foot each side thereof, but the defendant refused so to do.

That thereafter and on the 11th day of June, 1910, the plaintiff city duly adopted an ordinance requiring the defendant company to pave its right of way on said portions of said street with asphalt, said ordinance being as follows:

"Whereas, the City of Madison has heretofore ordered the paving of University Avenue from Charter Street to Francis Street, with asphalt, and,

Whereas, the Southern Wisconsin Railway Company occupies with its railway tracks and roadbed the central portion of that part of said Avenue between Charter and Park Street-, and,

Whereas, the roadbed as now constructed would not be in keeping with or correspond with the remainder of said portion of said avenue, as so improved with asphalt pavement, or be as substantial or enduring, and would soon damage such pavement,

Now therefore, the common council of the City of Madison do ordain as follows:

Section 1. The Southern Wisconsin Railway Company be and is hereby directed and ordered to reconstruct and pave its roadbed on that portion of University Avenue between Charter and Park Street-, in accordance with the City Engineer's plans and specifications for said work; such plans and specifications being hereto attached and made a part hereof; or in accordance with such other plans for a crushed stone, concrete or other equally good foundation for its ties and a suitable asphalt surfacing for its roadbed and a foot on the outside of each rail shall, that when completed
41½ said roadbed and the strip one foot outside of each rail shall correspond with the remainder of the asphalt improvement on said portion of said Avenue.

Section 2. The contract for the asphalting and otherwise improving University Avenue between Charter street and Francis street having been let, and the work having been commenced, it is hereby ordered that said Southern Wisconsin Railway Company shall, without delay, proceed with its part of the work for the improvement of said Avenue, as provided in the preceding section, and shall have the work completed not later than October 15, 1910.

Section 3. Should said railway company neglect or refuse to comply with the requirements of this ordinance said company shall be liable to a fine or penalty not exceeding Fifty ($50.00) Dollars per day *for* each day the said company neglects or refuses to construct said roadbed according to the provisions of this ordinance, after the time herein specified, shall constitute a separate offense.

Section 4. This ordinance shall take effect and be in force from and after its passage and publication.

That said ordinance was immediately following its passage duly published and notice thereof given to the defendant company.

That the defendant company neglected and refused to comply with the terms of said ordinance to improve its right of way on said portion of said street and the necessity existing for said work to proceed the plaintiff city and defendant company on the 20th day of August, 1910 duly made and entered into the following agreement respecting the work of improving the right of way of defendant company on said portion of said street:

"Whereas the city of Madison sometime since decided to improve with asphalt that portion of University Avenue between Park Street and Charter Street in the City of Madison and has let the contract therefor, and the contractor is now at work and his work has now proceeded as far as the railway track of the street railway at Park Street, and,

Whereas the Southern Wisconsin Railway company occupies the central portion of that portion of said Avenue from Park street to Charter street with its line of street railway, and,

Whereas the city claims it necessary that the railway strip be improved in substantially the same manner as the remainder of the street in so for as the concrete foundation and asphalt top are concerned, and the city claims it is very necessary that said work should be done at the same time, and

Whereas the City of Madison insists that it is the duty of the Railway Company, under its franchise and the laws of Wisconsin, to grade, pave and otherwise to improve that portion of said Avenue between its rails, and one foot on the outside of each rail to correspond generally with the proposed improvement of the Avenue and has heretofore ordered and directed the Railway Company, that it do such work as therein directed, and,

Whereas, the Street Railway Company insists that such is not its duty and on demand by the City, has refused and still refuses to do said portion of said work, except to grade.

Now therefore, to the end that the work of grading, paving and otherwise improving that portion of University Avenue from
42 Park Street to Charter Street, may not be delayed, and that the work may all be done at one time thus insuring much better results, and to the end that the legal rights and duties of the City and of the Railway Company, in case of such improvement may be finally determined and with the least delay.

It is hereby stipulated and agreed, 1. That the city of Madison shall order and cause the improvement Company to which the contract for the paving and improvement of said Avenue has been let,

to pave that portion of University Avenue between Park Street and Charter Street, between the rails of the Southern Wisconsin Railway Company and one foot on the outside of each rail thereof in accordance with the plans — specifications hereto annexed and made a part hereof, marked "Exhibit A," and under the supervision of the engineer of said Railway Company.

2. That the cost of such work will be in the first instance paid by the city of Madison with the specific understanding and agreement, however, that it is the intention hereof that the party charged with the duty of doing said work shall pay therefor and that the right and duty of the city and said railway company in the premises shall be determined and that on or before the completion of said work the City of Madison shall bring suit if it so elects in the Dane Circuit Court to recover the amount so paid for the paving and improving of said railway strip by the city.

It being understood also that the city may institute such suit as soon as any part of said work has been paid for by the city and no claim shall be made that such suit is prematurely commenced so that the issue may be tried in the October term of said Court, if possible, so that an appeal may be taken to the Supreme Court and to the United States Supreme Court should either party so desire.

3. That said action may be a simple civil action for the recovery of the sums so paid by the city and that any and all questions respecting the nature, kind or form of said action, the regularity of the letting of the contract for the improvement of the Avenue or the ordering the work in question and the form or sufficiency of the proceedings of the city, looking to the improvement of the railway strip and the cost and nature of the work, shall be waived to the end that there may be prompt determination respecting the merits of the matter in issue.

4. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave that portion of the Avenue herein referred to as occupied by its track, that the street railway company shall immediately repay to the city the amount paid by the city for said work on said right of way together with interest from the date of payment thereof by the city to the contractor.

5. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave the strip in question that the city will not insist on its claim for any penalty for the failure of the railway company to have completed said work within the time specified.

This agreement shall bind the parties hereto, their successors and assigns.

Dated this 20th day of August, A. D. 1910.

(Signed) JOHN A. AYLWARD.
JONES & SCHUBRING,
Attorneys for Southern Wisconsin Railway Co.

That following the making of said agreement the plaintiff city ordered the Andrews Asphalt Paving Company under the terms

of its contract with said city for the improvement of Uni-
43 versity Avenue to do the work provided for in said stipulation and plans and specifications therein provided for and to carry the same on with the remainder of its work, together with the other improvement on said terms under t' e term of "Extra Work" in said contract, of which fact the defendant company was informed and to which said arrangement it consented *to*.

That in pursuance of said stipulation between the plaintiff city and the defendant company said Andrews Asphalt Paving Company immediately proceeded with said work and fully and in all things duly completed said work of asphalting said portion of said street including the right of way of the defendant company between Charter Street and Park Street, under the supervision of the city engineer which work was in all things done completely in compliance with said stipulation between plaintiff city and defendant company on the 14th day of October, 1910, which day said entire work was accepted by the plaintiff city. That a fair and reasonable and market price for furnishing labor and material for improving said right of way of defendant company pursuant to the terms of said stipulation was the sum of $3,912.24, which said sum the plaintiff city on the 14th day October, 1910 paid to the Andrews Asphalt Paving Company in full payment for the cost of doing the work of improving the right of way of the defendant company on said street under the terms of said stipulation.

That by reason of the facts aforesaid the defendant company became indebted to the plaintiff city in the sum of $3,912.24 together with interest thereon from the 14th day of October, 1910 no part of which has been paid.

Wherefore the plaintiff prays judgment against the defendant company in the sum of $3,912.24 together with interest from the 14th day of October, 1910.

JOHN A. AYLWARD,
City Attorney.

STATE OF WISCONSIN,
County of Dane, ss:

Joseph Schubert being first duly sworn on oath says he is the Mayor of the City of Madison and makes this affidavit on its behalf. That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those he believes it to be true. That the reason this verification is not made by the plaintiff is that it is a municipal corporation, that his knowledge and information which are the grounds of his belief are derived from his personal participation in negotiations, contracts and stipulations referred to and an inspection of the books and records of defendant Co.

J. C. SCHUBERT.

Subscribed and sworn to before me this 9th day of September, 1911.

JOHN A. AYLWARD,
Notary Public, Dane County, Wisconsin.

44 (Endorsements:) State of Wisconsin. In Circuit Court for Dane County. City of Madison, a corporation, plaintiff, vs. Southern Wisconsin Railway Company, defendant. Summons and Complaint. Service of the within admitted this 9th day of September, 1911. Jones & Schubring, Att'ys for Def't. Filed: Circuit Court, Dane County, Wis., Jan. 6, 1912. Nissen P. Stenjem, Clerk. Filed: Jul- 28, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

45 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, a Municipal Corporation, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, a Corporation, Defendant.

And now comes the above named defendant by Jones & Schubring, its attorneys, and for answer to the complaint of the plaintiff respectfully alleges and shows to the Court:

It denies each and every allegation, matter and thing in said complaint contained except as herein admitted or otherwise answered.

It admits that the City of Madison is a municipal corporation organized and existing under the laws of the State of Wisconsin.

It admits that the defendant is a street railway corporation organized and existing under the laws of the State of Wisconsin with its principal office and place of business in the City of Madison, Wisconsin.

It admits that on the 8th day of March, 1884, the plaintiff city gave to the Madison Street Railway Company a street railway franchise in terms substantially as set forth in the complaint, but alleges that said franchise expired March 8, 1909.

It admits on information and belief that said Madison Street Railway Company accepted said franchise and commenced the construction of the line therein provided for.

It admits that on February 26, 1889, the plaintiff city granted a franchise to the Madison City Railway Company a street railway company organized under the laws of Wisconsin and doing
46 business in Madison, Wisconsin, substant ally in the terms set forth in Folios 17 to 21 of the complaint, and that said Madison City Railway Company accepted said franchise and entered upon the performance of its provisions.

It admits that on June 10, 1892, the plaintiff city granted to the Madison City Railway Company the franchise set out in Folios 22 to 43 of the complaint, and that the said Madison City Railway Company accepted said franchise and proceeded to operate its line of railway under and pursuant to said franchise.

It admits that University Avenue in the City of Madison is one of the broad public thoroughfares of said City and an important thoroughfare for the western portion of said City, and that the

grounds of the University of Wisconsin with some of its buildings lie along the Northern and Easterly side of said Avenue from Charter Street to Park Street.

It admits that this defendant has succeeded to all the rights, duties, powers, franchises and responsibilities of the Madison City Railway Company as provided by the said franchise referred to in the complaint in Folios 22 to 43 inclusive, granted to Madison City Railway Company on June 10, 1892.

It admits that the plaintiff City prior to July 10th 1910 improved the portions of University Avenue referred to in the complaint with crushed stone, but denies that such material was unsuitable for said street or for the traffic passing over the same.

It admits that prior to the 10th day of July, 1910, the plaintiff city decided to pave said portion of University Avenue between Charter and Park Streets with asphalt pavement and that it entered into a contract with the Andrews Asphalt Paving Company for paving University Avenue from Gilman to Charter Street.

47 It admits that the right of way of the defendant on said portion of University Avenue had been improved with crushed stone and alleges that such improvement was wholly satisfactory, suitable and sufficient for the traffic on the said street, and denies that such portion of said street was frequently out of repair and unfit for travel, and that such improvement was ill adapted and unfit for the kind of traffic on said street, and denies that it was out of repair or ill adapted to the kind of traffic on said street at the time when the plaintiff city decided to pave staid street with asphalt or when it entered into said contract with Andrews Asphalt Paving Company above referred to.

It admits that the plaintiff City informed the defendant company of the city's determination to improve said portion of University Avenue with asphalt pavement, and that it requested this defendant to likewise improve its right of way on said Avenue, that is the portion occupied by its railway track and one foot on each side thereof, and that this defendant refused so to do.

It admits that thereafter and on or about the 11th day of June, 1910, the plaintiff city adopted an ordinance requiring defendant to pave its right of way on said portion of said street with asphalt, said ordinance being substantially as set forth in Folios 50 to 53 inclusive of the complaint, and that the same was duly published and notice thereof given to defendant.

It admits that the defendant company refused to pave the portion of said University Avenue between its tracks and one foot on the outside thereof with asphalt as requested by the City, and that on or about the 20th day of August, 1910, the plaintiff city and the defendant entered into the stipulation set forth in Folios 54 to 61 inclusive.

It admits that thereafter and pursuant to said stipulation with the plaintiff city said portion of University Avenue lying between
48 the rails of the defendant company and one foot on the outside thereof was paved with asphalt in accordance with said stipulation, and that such work was being carried on with the knowl-

edge of the defendant, and that said work was duly completed in compliance with said stipulation above referred to on the 14th day of October, 1910, and was on said day accepted by the plaintiff city.

It admits that the fair and reasonable market price for the labor and material for said improvement pursuant to the terms of said stipulation was the sum of $3912.24 as set forth in the complaint, and that the plaintiff city paid said sum to the Andrews Asphalt Paving Company in full for the doing of said work and improvement.

Further answering said complaint the defendant alleges that it is not its duty nor is it under obligation to pave or repave the portion of University Avenue lying between Park Street and Charter Street which lies between the rails of its track and one foot on the outside thereof; that under its franchise from the plaintiff city it is under obligation merely to grade and repair the said strip of said street lying between its rails and one foot on the outside thereof. That it has at all times kept said strip of said University Avenue between its rails and one foot on the outside thereof in good repair and the same was in good repair at the time the said plaintiff city determined to improve said University Avenue with asphalt and at all times when it requested this defendant company to so improve the portion lying between the rails of its track on said street and one foot on the outside thereof.

Defendant further alleges that in the year 1906 it relaid its track of railway on said portion of University Avenue lying between Park Street and Mills Street, and in 1908 from Mills St. to Charter St., and that its said ties on said portion were laid on a bed of
49 crushed stone and crushed stone *were* placed between and over the ties, and said construction of said portion of its said line was an approved and good method of construction and of a permanent character, and that it kept said portion of said macadam lying between its rails and one foot on the outside thereof in good repair during all times thereafter, and that such improvement was sufficient and well adapted for the traffic passing over said street and for said City.

Further answering said complaint defendant alleges that ever since the year 1893 this defendant by itself and its predecessors has operated its street railway property in this City and on said portion of University Avenue between Park Street and Charter Street referred to in the complaint under authority of and pursuant to the terms and conditions of the said franchise granted by the plaintiff city to Madison City Railway Company on June 10, 1892, and that said franchise was the only subsisting street railway franchise granted by the said plaintiff city at the time when the plaintiff city determined to improve said portion of University Avenue referred to in the complaint herein with asphalt, and at the time when it ordered said defendant to so improve the strip of macadam between the rails of its said track and one foot on the outside thereof, and at the time of the entering into of the stipulation between the plaintiff and the defendant referred to in the complaint, and that said

franchise is now the only subsisting franchise held by defendant Company.

Defendant further alleges on information and belief that it was the intention of the said plaintiff city in granting said franchise of June 10, 1892, and of the said Madison City Railway Company in accepting the same that said franchise superceded all other franchises theretofore granted by the plaintiff city either to the
50 Madison Street Railway Company or the Madison City Railway Company, and that said prior franchises were thereby repealed and were no longer of any force and effect.

Further answering said complaint defendant alleges that its said franchise granted by the plaintiff city on June 10, 1892, and under which this defendant is now operating its street railway system in the plaintiff city is a contract between the plaintiff city and this defendant under the rights and benefits of which defendant is protected not only by the laws and constitution of the State of Wisconsin, but by the laws and the constitution of the United States.

To hold notwithstanding the expressed terms of said franchise or contract that the defendant company should be compelled to pay the cost of said improvement referred to in the complaint would be to deny to the defendant equal protection of the laws and constitution of the United States, and would be taking from the defendant property and contract rights without due process of law contrary to the provisions of the Constitution of the United States.

Further answering said complaint defendant denies that it is indebted to the plaintiff in any sum whatever on account of said improvement or pavement of said University Avenue as set forth in the complaint.

Wherefore the defendant prays to be hence dismissed with costs of suit.

JONES & SCHUBRING,
Defendant's Attorneys.

51 STATE OF WISCONSIN,
Dane County, ss:

Dudley Montgomery being first duly sworn on oath deposes and says that he is Vice-President of the Southern Wisconsin Railway Company, the defendant above named, and makes this verification in its behalf and is duly authorized thereunto; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

That the reason why verification is not made by the defendant, is that it is a corporation, that his information and knowledge which are the grounds for his belief, are derived from his personal attention to and supervision of the matters stated in said answer and information derived from the books and records of said corporation and record and statements made by subordinate officers and agents of said corporation to him in regular course of their duty.

DUDLEY MONTGOMERY.

Subscribed and sworn to before me this 5th day of January, A. D. 1912.

DAISY E. LORIGAN,
Notary Public, Dane County, Wis.

52 [Endorsements:] Original. State of Wisconsin. Circuit Court, Dane County. City of Madison, a Municipal Corporation, plaintiff, vs. Southern Wisconsin Railway Company, a Corporation, defendant. Answer. Service of a copy of the within answer is admitted this 29th day of September, 1913. John A. Aylward, City Att'y. Jones & Schubring, Badger Block, Madison, Wisconsin, Def's Attorneys. Filed: Jan. 6, 1912. Circuit Court, Dane County. Nissen P. Stenjem, clerk. Filed: Jul- 28, 1913. Clarence Kellogg, clerk of Supreme Court, Wis.

53 STATE OF WISCONSIN:

In Circuit Court, Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

Findings of Fact and Conclusions of Law.

The above entitled action coming on to be heard before the court without a jury, the plaintiff appearing by William Ryan, city attorney, and John Moran of counsel, and the defendant appearing by Jones & Schubring, its attorneys, and the court having listened to the testimony and heard the argument of counsel and taken the matter under advisement, makes and files the following:

Findings of Fact.

1. That on June 10, 1892, the city of Madison granted to the predecessor of the defendant a franchise to operate an electric street railway in the city of Madison, which said franchise has become the property of the defendant; that among other things said ordinance provided: "Said company shall keep the space between the rails of each track, and for the space of one foot on the outside in proper repair, so as not to interfere with travel over the same."

2. That prior to 1910 University avenue had never been permanently improved; that before that year portions of the street had been covered with crushed stone; that in 1906 the defendant had relaid its tracks on University avenue from Park street to Mills street, and that in 1908 it had relaid its tracks from Mills
54 street to Charter street; that when such track was relaid the area occupied by the track had been filled with a macadam made of crushed limestone; that the portion of University avenue was subject to very heavy traffic during the years from 1906 to 1910 inclusive, which quickly ground up the crushed stone and rendered the macadam along the track defective and out of repair.

3. That at and prior to July 11, 1910, the space between the rails of the track of the defendant and for one foot on either side along University avenue from Park street to Charter street had become so out of repair as to interfere with travel over the said space and the tracks laid thereon; that the said area was in places so out of repair that it was difficult for vehicles to pass from one side of the track to the other; that the macadam at places, and especially at street intersections, was from two to four inches below the level of the top of the rails; that there were grooves or ruts worn in the macadam parallel with the rails which were two or three inches deep; that the paving upon the railway zone was in such a state of repair in 1910 that at most places vehicles could not cross without exercising more than ordinary care; that the crushed stone placed upon the track of the defendant company had become worn down between the ties, causing a series of depressions between the ties, which was perceptible to anyone who drove along the track in a vehicle.

4. That in 1910 University avenue from Park street to Charter street was improved with sheet asphalt; that the defendant refused to pave the area occupied by its tracks with asphalt; that the plaintiff, pursuant to a stipulation with the defendant, paid the expense of paving such an area with asphalt to correspond with the rest of the street; that the cost and reasonable expense of paving such area was $3,912.24.

5. That macadam formed of the crushed stone used by the defendant on its tracks on University avenue is not a proper pavement for a street having as heavy traffic as University avenue; that such macadam rapidly wears down under heavy traffic, causing depressions in the space occupied by the tracks, which would interfere with travel over the same from an ashpalt pavement on either side; that traffic over such depressions would injure the asphalt on either side of the railway zone, and that in warm weather small particles of crushed stone would be carried upon the asphalt when soft and cause permanent injury to the same.

Conclusion of Law.

That the plaintiff is entitled to a judgment against the defendant for $3,912.24, with interest on the same from October 14, 1910, together with its costs and disbursements to be taxed according to law.

Let judgment be entered accordingly.

By the COURT:

E. RAY STEVENS, *Judge.*

Dated March 24, 1913.

Either party may within ten days submit to the court additional findings or suggestions as to the form of the above findings, serving a copy of the same upon opposing counsel.

55 *Memorandum of Decision.*

By the COURT:

In reaching its decision the court has assumed that the franchise of the defendant is a contract and that its rights and obligations are fixed by the ordinance of 1892. The defendant concedes that it was its duty to keep the area occupied by its track in repair. The evidence satisfies the court that in 1910 this area was not in such a state of repair as to comply with the requirements of the ordinance.

The only question that remains is, what were the obligations imposed on the defendant by the ordinance which required the defendant to keep this area "in proper repair so as not to interfere with travel over the same?" With a single exception the franchise is the same in legal effect as that considered in State ex rel. City of Milwaukee v. Milwaukee Electric Ry. Co. (Wis.) 139 N. W. 396, where it was held that it was the duty of the company to repave the railway zone with the same material as that used upon the rest of the street. That single exception is the absence in this franchise of the provision that the repairs should be of the same material as used upon the rest of the street.

Construing the ordinance of 1892 in the light of the established rule that "The intendments must logically be favorable, rather than adverse, to the public" (139 Wis. 399), the court concludes that the absence of this provision in the Madison ordinance does not take the case out of the rule of the Milwaukee decision. It follows that the defendant cannot be said to meet its obligations by simply repairing the area occupied by its tracks with the same material as that of which the road was constructed when the street railway company entered upon its forty year franchise term.

The case falls clearly within the rule of Mayor of New York v. Harlem Bridge Ry. C., 186 N. Y. 30; 78 N. E. 1072, where the charter provision was identical in legal effect with that here under consideration.

The court concludes that the case falls within the rule of the Milwaukee case cited above. The city is therefore entitled to judgment for the amount expended in paving the street railway zone on University avenue with asphalt.

56 [Endorsements:] State of Wisconsin. In Circuit Court for Dane County. City of Madison, a corporation, Plaintiff; vs. Southern Wisconsin Railway Company, Defendant. Findings of Fact and Conclusions of Law. Filed and Entered Judg. & Rec. Book 33, Page 98. Mar. 24, 1913. Nissen P. Stenjem, Clerk. Filed Jul. 28, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

57 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

Judgment.

The above entitled action being at issue and coming on for trial at the January, 1913 term of said court, and having been tried before the court, Honorable E. Ray Stevens, Circuit Judge, presiding, and without a jury, a jury trial having been waived, the plaintiff appearing by William Ryan, city attorney, and John Moran of counsel, and the defendant appearing by Jones & Schubring, its attorneys, and the court having filed its findings wherein judgment is directed to be entered as follows:

On motion of William Ryan, plaintiff's attorney,

It is adjudged, that the plaintiff, the city of Madison, do have and recover of the defendant, the Southern Wisconsin Railway Company, the sum of four thousand four hundred ninety-nine and 8/100 dollars ($4,499.08), and that said plaintiff recover of said defendant the sum of sixty-eight and 56/100 dollars, the costs and disbursements of this action, as taxed and allowed.

By the court:

NISSEN P. STENJEM, *Clerk*,
By MARY GRANE, *Deputy*.

Dated Madison, April 14, 1913.

58 [Endorsements:] Original. State of Wisconsin. In Circuit Court for Dane County. City of Madison, a corporation, Plaintiff, vs. Southern Wisconsin Railway Company, Defendant. Judgment. Filed and Entered Judg. & Rec. Book, Page 100, Apr. 14, 1913. Nissen P. Stenjem, Clerk. Judgment Docket M. Page 48. Filed: Jul. 28, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

59 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

Gentlemen: Please take notice that the within is a copy of the Bill of Exceptions proposed on behalf of the defendant in this action,

and that a copy of the reporter's notes taken at the trial and transcribed in long hand is made a part thereof.

JONES & SCHUBRING,
Defendant's Attorneys.

To William Ryan, City Attorney, and John Moran, of Counsel.

Service of a copy of the within proposed bill of exceptions is admitted this 7th day of June, 1913.

WILLIAM RYAN,
Plaintiff's Attorneys.

60 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

It is hereby stipulated by and between the above named parties by their respective attorneys that the annexed Bill of Exceptions be signed by the trial judge herein and settled as such Bill of Exceptions in the above entitled case including the exhibits thereto attached.

WILLIAM RYAN,
Attorneys for Plaintiff.
JONES & SCHUBRING,
Attorneys for Defendant.

Dated June 7th, 1913.

61 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

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62 STATE OF WISCONSIN:

In Circuit Court for Dane County.

CITY OF MADISON, Plaintiff,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Defendant.

Bill of Exceptions

Be it remembered, that this action being at issue and on the calendar was brought to trial at the regular January 1913 term of said court, to-wit on the 26th day of February, 1913, before Hon. E. Ray Stevens, circuit judge presiding, without a jury; William Ryan, City Attorney, with John Moran of counsel, appearing for the plaintiff, Jones & Schubring appearing for the defendant. The following testimony was taken and proceedings had, to-wit:

Mr. Ryan: The plaintiff moves for judgment upon the pleadings in the sum of $3,912.24, together with interest from the 14th day of October, 1910.

Court: For the purposes of the trial, the motion may stand overruled.

Exception by plaintiff.

JOHN F. ICKE, being first duly sworn, testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan.)

Q. Mr. Icke, you reside in the city of Madison?

A. I do.

Q. At present you are engaged in the contracting business here, are you?

A. I am.

63 Q. Prior to last April you were the city engineer of the city of Madison, were you not?

A. I was.

Q. And for how long a time?

A. For ten years previous.

Q. During that time what experience did you have in street construction?

A. Had charge of all the street work that was done in the city of Madison during that time.

Q. Was there considerable street work done during those ten years while you were city engineer?

A. There was.

Q. What kind of street work was done?

A. Why, practically all the various types of pavements that are in common use now: macadam, vitrified brick, sheet asphalt, creosote block.

Q. What streets during that time were improved by sheet asphalt upon a concrete foundation?

A. The first streets that were improved were the four streets abutting the capitol square; the next street was University avenue from Gilman to Charter, and the next streets were Park, State and Gilman, and last year Sherman avenue and several more streets out in the seventh ward.

Q. On which of those streets are the tracks of the railroad company located, that are improved with asphalt?

A. The tracks of the street railway company are located on portions of University avenue, Park street and State street and the four streets, around the capitol square, I guess that's all on which sheet asphalt has been laid.

Q. As city *of* engineer you were a member of the board of public works of the city during that period, were you, Mr. Icke?

A. For a portion of the time, yes.

64 Q. What portion of the time did that cover?

A. The last five or six years I think.

Q. Were you a member of the board of public works in the year of 1910?

A. I was.

Q. That is, you were a member of the board of public works from about 1905 until last April, were you?

A. I believe so.

Q. And then you were a member of the board of public works at the time that University avenue was ordered improved by the city, were you?

A. I was.

Q. You may describe generally University avenue, what kind of a street is it and the nature of the traffic over it?

A. University avenue, that portion of it that is improved with sheet asphalt, is a street which is 99 feet between property lines, it is paved with sheet asphalt for a width of 66 feet between curbs——

Q. I have reference to the time previous to the improvement with sheet asphalt.

A. Previous to the improvement with sheet asphalt it was a street that had been improved, partially improved, by the use of crushed stone. The crushed stone was placed principally along the center of the street for that portion which is not occupied by the street railway tracks, and it was also partially paved with crushed stone on either side of the track, from Park street out to Charter street. A portion of the street had some old stone gutters on it, and the part that was improved with crushed stone was an ordinary dirt street. There was no underground drainage of any kind on the street. The underground drainage was put in at the time the permanent improvement was placed.

65 Q. Had that street ever been permanently improved at the expense of the abutting property?

A. It had not for that portion that I mentioned, from Gilman street to Charter street.

Q. What improvement was done upon that street during the years immediately preceding 1910?

A. Why, there was no improvement done on the street. The only work that was done on the street was in the nature of repairs.

Q. And what was that work?

A. It consisted in keeping the street in repair by filling up the depressions as they appeared from time to time, by using crushed stone, using the same material that is used in the construction of macadam roads in this city. It was a renewal process practically each year or throughout the year, as the weaknesses in the pavement developed they were taken care of by filling up with crushed stone.

Q. Now what was the nature of the traffic over University avenue, Mr. Icke?

A. Well, it has quite a good deal of traffic, farmer traffic, teams coming in from the west end of the city, from the country west of the city. It is the main artery for the traffic that comes in from what is known as the Middleton district. Besides that, of course, it serves the west end of the city more or less. It also is more or less of a highway for traffic, the stone traffic which comes in from the west end of the city, where the stone quarries are located and where the brickyard is located.

Q. How many stone quarries are located west of the city?

A. There are three stone quarries located just west of the city?

Q. From those stone quarries the stone is supplied for use in the city?

A. For use in construction purposes, road construction and building construction.

66 Q. What is the weight of the stone usually drawn, in loads, over University avenue coming into the city?

A. Well, just at present, for the last few years back, the minimum weight of a load of stone has been 5,500 pounds, but previous to that the loads varied quite a good deal, sometimes running up as high as seven or eight thousand pounds.

Q. That is, exclusive of the weight of the wagon?

A. Exclusive of the weight of the wagon.

Q. Just the weight of the stone itself?

A. Yes.

Q. What is the weight of the wagon used in hauling stone?

A. All the way from fifteen to eighteen hundred pounds.

Q. Is University avenue the street leading from the city toward the cemetery also?

A. Yes, it is one of the streets which lead out to the cemeteries.

Q. And what buildings are located across this street?

A. This particular portion abuts on the University property for a distance from Park street to Charter street, and on the rest of the property is business and residential property.

Q. What is the width of University avenue as compared with the other streets leading into the city from that direction?

A. It is the widest street; it is 99 feet between property lines, and the other streets are generally 66 feet wide.

Q. What do you say as to its use as a driveway for people who are driving for pleasure, going westward from the city?

A. It has a very heavy traffic of that particular kind just now, ever since it has been permanently improved.

Q. More specifically, what was the condition of that portion of University avenue in question here at the time or immediately prior to the time it was ordered improved by the city in 1910?

A. Well, as I have already mentioned, the street was covered with crushed stone, quite a number of years ago I suppose, previous
67 at least to my knowledge, and ever since then it has been kept in repair by the use of crushed stone. The street railway track ran along the center of the street from Park street over to Charter street and at Mills street it branched off and went toward the South Madison line. As I recall, the street railway track, just about the time that the street was ordered improved, was raised somewhat above the general level of the street. The new rails and steel had been laid there a few years before, and when the new steel was laid a request came to me to give a grade for the street which would fit in with the permanent improvement that would be laid there in a comparatively few years, which on that account necessitated the raising the track somewhat above the general level of the street, and that portion occupied by the street railway was improved in the ordinary way, by the use of crushed stone, and outside of that the street existed as it had existed for a good many years; it was in a rough, unimproved condition.

Q. You say it was rough and unimproved. What would you say as to its surface being level or otherwise?

A. Well, it could hardly be considered as being level. It was a very irregular surface, due principally to the heavy traffic that went over the street.

Q. Were there any holes in the street?

A. Yes, there were holes in the street.

Q. What was the condition of the railway strip with respect to the portion at the side being level with the rails?

A. I don't recall that it was level with the rails. It was like other portions of the system. The macadam between the rails had worn down and was no longer level with the rails.

Q. What was the condition of the macadam strip one foot outside of the rail, with respect to its height?

68 A. That portion was paved or crushed stone was placed up against the rail at the time the new steel was laid, and for a portion of the distance it was still in pretty good condition. On other portions of it, especially down at the Park street corner, it had worn away and was no longer level with the top of the rail.

Q. What do you say with respect to the facility or ease with which vehicles might pass over the rail from one side of the street or the other?

A. Due to the fact that the macadam had worn down below the level of the rails, it made it a little bit difficult for vehicles to get from one side to the other without using more than ordinary care.

Q. Will you explain the nature of the construction of the street at that time underneath the street railway system and including the street railway strip?

A. The track when it was newly laid was ballasted with crushed stone, and I think there was a layer of about six inches of crushed stone placed underneath the ties, and then of course the space between the ties, up to the level of the rails, and for the space outside, when it was originally constructed, was filled in with crushed stone also.

Q. And the macadam filled in between the rails?

A. The macadam in between the rails. On account of the fact that the track had been raised—well, in some places as much as a foot above the former grade, it became necessary for the city to put in additional material outside of the ties in order to bring the track down to the grade of the street on either side—oh, for a distance of four or five or possibly six feet on each side of the outside of the rail. The city used crushed stone for that purpose, to grade up to the new grade of the track.

69 Q. You say the ties had been laid upon a bed of crushed stone, and there was crushed stone and macadam above. What kind of stone was that, Mr. Icke?

A. It is limestone, the limestone which is used in this city for macadam construction.

Q. And was that the same kind of stone that was on the rest of the street, University avenue?

A. The same kind of stone, yes.

Q. What was the effect, Mr. Icke, of the travel that went over University avenue in the years immediately prior to 1910, upon the macadam composed of this crushed stone?

A. Well, the traffic being so heavy, it wore down the macadam as it was laid, and it necessitated constant repairs on the part of the city to keep the street in a passable condition.

Q. Did the traffic along the street, and especially along that portion between the rails, have the effect of depressing the crushed stone between the rails, so as to leave an uneven space along the railway strip, between the ties?

A. There was the tendency of course to compress the stone between the rails which you will find along all the macadam street railway construction. The stone will sink more between the ties than it will over the ties, and there will be a succession of depressions and bumps.

Q. Was that the condition on University avenue immediately prior to 1910?

A. More or less, yes.

Q. Were these depressions so frequent that they indicated where the ties of the railway company were laid?

Objected to as leading.

Objection sustained.

Exception by plaintiff.

70 Q. Will you state, Mr. Icke, the nature and character of those depressions more fully, of which you have just spoken.

A. They were perceptible to anybody driving or anybody riding a bicycle over the track. You could notice very readily the succes-

sion of hollows and rises in the macadam between the rails for th whole distance that the street was improved.

Q. Taking into consideration the nature of the traffic over Un versity avenue during the year of 1910, what would you say as t whether a macadam construction for a street improvement, simila or of the kind that had been in use, and especially between the rail way tracks and one foot on the outside of the track, was adapted fo street improvement on that street?

Mr. Jones: That is settling the whole question that is here befor the court for dispute. The real question is this, and that is for th court to decide, whether it is possible to have macadam—I suppos that is the claim now made, that you can't have macadam road ad joining an asphalt pavement. Now it seems to me that's a conclu sion, perfectly plain I should say to everybody, that if the macadam is kept in good repair and even, there is no difficulty in a team cross ing the street car track.

Objection overruled.

Exception by defendant.

A. When it came to the question of permanently improving th street, it was entirely out of the question to use macadam for that particular purpose, because our previous experience, not only on the avenue itself, but on other streets in the city, convinced us that macadam was not adapted for the heavy traffic.

Mr. Jones: I move to strike out the last sentence, that former ex perience had convinced them that they couldn't use macadam.

Motion granted.

Exception by plaintiff.

71 (Question read).

A. Well, it was not adapted for use on that street.

Q. And that was true, was it, not only of the strip between the railway tracks and one foot on the outside, but of the whole street, was it not?

Objected to as irrelevant and immaterial.

Objection overruled.

Exception by defendant.

A. Just as much so for that strip occupied by the street railway track as for the rest of the street.

Q. As city engineer did you prepare the plans and specifications for the improvement of University avenue in 1910?

A. I did.

Mr. Ryan: I want to offer in evidence the plans and specifications.

Q. I show you Exhibit 1 and ask you what that is?

A. This is the plan and profile of the sheet asphalt pavement that accompanied the specifications for the improvement of University avenue from Charter street to Francis street, adopted by the common council May 13th, 1910.

Q. And what portion of that part of the street did those plans cover?

A. They covered the improvement from property line to property line for the distance from Charter street to Francis street. The width of the pavement is 66 feet between curb lines; 62 feet of asphalt, 2 feet of gutters on each side, with the necessary drainage and underground drainage.

Q. Did that plan Exhibit 1 relate to the railway strip?

A. It shows the street railway track for that portion from Park street to Charter street, but it doesn't include any work on the strip, which is 7 feet wide.

72 Q. In other words, that is a plan for the portion of the street exclusive of the railway zone, is it?

A. Yes, that part of the street that the contractor was to base his bid on for the improvement of the street exclusive of the street railway strips.

Q. I show you Exhibit 2, headed "Proposal, Specifications and Contract for Asphalt Pavement," this Exhibit 2 being that portion of this bunch of papers included under the head of "Specifications," and ask you what that specification covered, what portion of the street improvement did that specification cover?

A. It covered the improvement of University avenue from Francis to Charter street with a sheet asphalt pavement, exclusive of the strip occupied by the street railway track from Park street to Charter street, together with the necessary grading and underground drainage, etc.

Q. Exhibit 3 is the contract for that specification, is it?

A. It is the contract made with the Andrews Asphalt Pavement Company with the city of Madison.

Q. And Exhibit 4 is what?

A. Exhibit 4 is the bond of the National Surety Company covering the improvement.

Q. Exhibit 4 is a power of attorney, is it not?

A. Yes, Exhibit 4 is a power of attorney, and Exhibit 5 is the bond.

Q. Now it is admitted here I think, Mr. Icke, that after the contract had been let for the portion of the street exclusive of the railway zone a stipulation was entered into, which is in the pleadings, for the improvement of the railway zone, and I show you Exhibit 6, this blueprint, and ask you what that is?

A. Exhibit 6 is a cross-section and a plan to cover the
73 manner of improvement of that strip occupied by the street railway track, approximately seven feet over all, or for that distance from outside of rail to outside of rail plus one foot on either side of the outside of the rails.

Q. Was the railway strip improved in accordance with that plan, Mr. Icke?

A. It was.

Q. And will you explain the nature of the improvement made there?

Mr. Schubring: That is objected to. There isn't any dispute here——

Court: Is that in question here?

Mr. Schubring: That the stipulation was carried out and the improvement made in accordance therewith. You don't claim that it wasn't?

Court: I don't see that that is material.

Mr. Ryan: I want to show the nature of the construction, leading up to the proposition that it would be impracticable for the city to improve with asphalt the other portion of the street and leave the railway zone with macadam.

Court: Is it the contention of the defense that that may be done?

Mr. Schubring: Certainly.

Court: Proceed then.

Exception by defendant.

A. The cross-section shows, starting out with the material shown in the lower part of the cross-section, that it was to be improved with crushed stone ballast on which the ties were to rest. The crushed stone ballast was to be six inches in depth on which the ties which are shown here as being six inches in depth were to rest.

74 The ties were to be spaced two feet center to center. On top of the ties the rails were to be spiked in the usual manner, and the space between the ties and underneath the rails and underneath the granite blocks was to have a bed of concrete known as 1-2-4 concrete. On either side of the rail on the outside there were to be laid 12-inch granite blocks, approximately 5 inches wide. They were to be laid close together and on a mortar. The bed of mortar was also to fill in the space between the web of the rail and the end of the blocks. On the inside there were to be special flange blocks laid approximately 5 inches wide, 5 inches high and 10 inches long. Those blocks were also to be laid on a bed of mortar. The concrete between the rails and between the granite blocks on the inside was to be laid up to a height within three inches of the finished surface of the street, and the strip between the inside blocks was then to be filled in with the regular sheet asphalt, consisting of a binder course one inch thick and a regular top consisting of a thickness of two inches, and the joints between the blocks were to be filled with a mortar.

Q. What is the purpose of granite blocks on the outside of the rail?

A. The purpose is to keep the sheet asphalt away from the rail, and have the sheet asphalt start at a point approximately above the end of the ties, on account of the fact that there is more or less vibration in the track itself as the cars pass over it, there is a tendency of course for breakage immediately over the end of the ties, and by laying the granite blocks on the outside and putting the asphalt up against the blocks the joint is made to start out with and it doesn't develop any other joints thereafter.

Q. And do the blocks on the inside answer a somewhat similar purpose?

75 A. The blocks on the inside are put in for a somewhat different purpose.

Q. What is that?

A. It is necessary to have a groove for the rail, for the projection on the wheel, and it isn't good construction to build the sheet asphalt right up to the rail on the inside, because it wouldn't stand the traffic, although it is good practice to use the granite blocks and pave the remaining distance between the granite blocks with sheet asphalt.

Q. What term, Mr. Icke, do you apply to the granite blocks on the outside of the rails?

A. They are spoken of as "headers" on the outside, and "special flange blocks" on the inside, "groove blocks" sometimes.

Q. Would it be good street construction to improve a street with sheet asphalt upon a concrete foundation, in which street there are railway tracks, the asphalt meeting up to the tracks, without the presence of granite blocks or some other similar header?

Mr. Jones: This is objected to. Nothing to prevent the granite blocks, I suppose, or any other construction.

Objection overruled.

Exception by defendant.

A. It is not considered good construction.

Q. And how far beyond the rails do the ties of the street railway company on University avenue project?

A. They are supposed to project about a foot. As a matter of fact they projected somewhat farther on some of the ties, the ties being longer than seven feet.

Q. Could there have been granite blocks or other similar headers placed one foot distant from the outside of the rail of the street railroad company's track on that street and the asphalt built up to that, and have what you would call a good street construction?

A. That is exactly what was done,—put the granite blocks on the outside of the rails.

76 Q. As a matter of fact, the granite blocks are placed within the rails, are they not?

A. Yes.

Q. Close to the rail?

A. Yes.

Q. My question assumes that had they been placed one foot distant from the rail, keeping without the railway zone entirely, would that have been good street construction?

A. It could have been done. They would have had to set farther than one foot away, on account of the fact, as I said before, that the ties projected in quite a number of places somewhat more than a foot beyond the end of the rail. There couldn't be used what are strictly known as granite blocks for that purpose. They would have to be regular granite curbing or something similar to it.

Q. With the railway zone,—meaning by that the strip between the rails and one foot outside—in the condition in which it existed prior to the improvement in 1910, would the street have been left in good condition after you improved it with asphalt, stopping one foot distant from the outside of the rail?

Objected to as not being a question for an expert.
Objection overruled.
Exception by defendant.

A. You couldn't have improved the street with a sheet asphalt and had it abut the street railway macadam construction; there would be no shoulder for the sheet asphalt, which is absolutely necessary to the construction of sheet asphalt against anything; you have got to have something firm against which the sheet asphalt is laid.

Q. Now my question is, would it have been good construction to have placed one of these shoulders such as you speak of in the street one foot distant from the outside of the rail?

77 A. No, I hardly think it would be considered good construction.

Q. Was it as a matter of fact feasible on University avenue?

Same objection.
Objection overruled.
Exception by defendant.

A. Why, I guess as far as its feasibility is concerned, it would have been possible to do it.

Q. Did you speak of the effect that the ties extending more than a foot beyond the rail would have?

A. This shoulder, whatever it would have been, would have to be laid out further than one foot from the outside of the rails; fourteen, sixteen inches further away from the outside of the rail.

Q. And if you had constructed it in that manner, would you have had a good permanently constructed street, Mr. Icke?

Mr. Jones: I object to that as calling for a decision of the whole question, not an expert question.

Q. If the city had improved the street outside of the railway zone, Mr. Icke, with sheet asphalt, stopping one foot distant from the outside of the rails, and later the railway zone was improved with sheet asphalt or some other permanent form of improvement, what would you say as to whether that is good street construction or not?

A. Well, it wouldn't be good street construction to the extent that it would be necessary to disturb the portion already laid by the city.

Q. You say disturb the work laid by the city. What do you mean by that?

A. You couldn't very well go in there and construct the street railway portion without at the same time disturbing that portion already constructed by the city.

Q. And if it were later so improved, would good street construction require a construction similar to that which has actually been

78 done there?

A. Yes, good construction would require that—but as a preliminary, not as something to follow. Good street railway construction would require that sort of a construction to be built first,

then the sheet asphalt to follow afterwards. You can lay the sheet asphalt while it is hot, while you are putting the hot stuff as we call it and lay that up against the granite headers if the granite headers are in place; but if the hot stuff is already there and has become cool, it is a difficult matter to lay the granite blocks up against it and get a good job.

Q. Now assuming that it became necessary some years after it—I don't mean immediately after it, but some three or four years after it, the strip outside of the railway zone had been improved, to improve the railway zone with asphalt or some similar permanent improvement, what work would you have to do there to have a good street construction and leave the street in a good, reasonably passable condition?

Objected to as irrelevant and immaterial.

Objection overruled.

Exception by defendant.

A. Now are you assuming that the tracks are not there at all?

Q. No, I am assuming the tracks are there.

A. Well, that hinges altogether upon the condition of the portion——

Q. Assuming, Mr. Icke, that the rest of the street had been improved with asphalt, stopping one foot distant from the outside of the rail?

Mr. Jones: And with the granite blocks, I suppose you mean?

Q. With the granite blocks or without the granite blocks.

A. Well, if the granite blocks are not there you have got to have something else outside there, and if you are assuming that
79 you have got crushed limestone and you have built your sheet asphalt up against that crushed limestone, you would have an irregular line all along where the sheet asphalt abutted on the limestone. In the first place, it would have been absolutely impossible to make a smooth joint or a smooth surface along that line which is one foot outside of the rail.

Q. Now if you had your granite blocks there, having been previously placed when the rest of the street was improved, and you come to improve the railway area with asphalt, what work would you do to leave the street in good passable condition?

A. If you had the granite blocks there on the outside of the track, the only portion to do would be to complete the rest of the street, which would be the strip between the tracks.

Q. If the granite blocks are one foot distant from the rails?

A. I get that mixed up, Mr. Ryan. The granite blocks that I have mentioned, I have referred to them as the headers. Possibly you are referring to the granite curb which is to be laid.

Q. Well, then, call it curb. I am referring to the blocks one foot distant from the outside of the rail.

A. Well, call that the curb.

Q. Very well. What would you do with the curb?

A. The curb would have to remain; the curb would remain there as a permanent part of the street.

Q. And would you put granite blocks immediately outside of the rails in a similar manner to what has actually been done?

A. Probably.

Q. So then you would have an asphalt street, with the header immediately outside of the outside rail, then a strip of asphalt, and then this curb again one foot distant from the outside of the rail, would you not?

A. Well, the curb would come right outside of the headers.

80 Q. That is, the header—that is mentioned as one foot?

A. Yes, one foot.

Q. So that would come right to the curb?

A. Yes.

Q. And your curb thereafter would serve no particular purpose, except as a portion of the street, would it?

A. That's all.

Q. I don't know whether you have answered this particular question, Mr. Icke. What is your testimony, or what do you say as to the condition of the street for the purpose of traffic and travel over it, which is improved by stopping one foot from the outside of the rail and leaving macadam in the center and asphalt on the outside?

Objected to as incompetent.
Objection overruled.
Exception by defendant.

A. Well, it wouldn't furnish a smooth pavement for the whole width of the street.

Q. And would it be good street construction?

Same objection.
Objection overruled.
Exception by defendant.

A. It would hardly be considered good street construction.

Cross-examination by Mr. Schubring:

Q. Now, Mr. Icke, the street wouldn't be as smooth, for the reason that the macadam strip between this granite curb on each side of the railway strip would not be as smooth as asphalt might be made—that's what you mean, that it wouldn't make as smooth a street?

A. It would not be as smooth as asphalt.

Q. The only effect of putting in this granite curbing to hold the asphalt and subsequently putting in the granite heading on

81 the outside of the rail would be that you increased the width of the granite block from 12 inches to 14 or 16 inches, would it not?

A. It depends altogether where that granite curb is to be placed. If it is placed just one foot from the outside of the rail, that space would be filled in with something else.

Q. That is, the width would be the width of your granite block and the width of your granite curbing, assuming that the two came together, would it not?

A. That would be the width which would not be sheet asphalt.

Q. And even though the granite curb should be placed at a somewhat greater distance than 12 inches from the rail, that distance could be filled by a granite block or header, could it not?

A. Oh, yes.

Q. Now, you spoke, Mr. Icke, of the traffic on this street prior to the time of its improvement in 1910. What was considered the heavy traffic on the street?

A. The hauling of crushed stone and building material.

Q. And how many quarries were there operated at that end of the city at the time that the improvement was made?

A. Three.

Q. Were they within the city limits?

A. No.

Q. But they were all to the west of the portion of University avenue which was improved, were they not?

A. Yes.

Q. How far to the west?

A. About two miles.

Q. But were all three tributary to this one street?

A. They were.

82 Q. Now aside from this heavy hauling from the quarries, what other heavy traffic was there on the street?

A. The traffic from the brickyard which is located in the west end, and the farmer traffic.

Q. Would you consider the farmer traffic as heavy traffic?

A. Some of it is quite heavy traffic, yes.

Q. What would be the nature of the heavy traffic that you now have in mind?

A. Farmer traffic?

Q. Yes.

A. The hauling of grain from Middleton, of which there is quite a good deal.

Q. You don't mean hauling it from Middleton to Madison?

A. Yes.

Q. Have they an elevator at Middleton?

A. I don't know about that.

Q. They have railroad connections at Middleton?

A. There is quite a little grain hauled from Middleton to Madison.

Q. For civic purposes?

A. For use right here in the city.

Q. How would that traffic compare with the traffic from the quarries and the brickyard?

A. There is not so much of it.

Q. What other traffic aside from that was there on the street?

A. Pleasure traffic.

Q. Anything else?

A. And traffic to accommodate the industries and people living in the west end of the city.

Q. That is, delivery traffic from the merchants?

A. And traffic to take care of the growth of the west end of the city, building.

83 Q. What traffic have you in mind?

A. The hauling of building material for construction work to the west end of the city.

Q. Were there any other parallel streets on which such hauling was done?

A. Yes.

Q. What streets were those?

A. Johnson street and Dayton street.

Q. Was Johnson street improved?

A. With macadam, yes.

Q. Was Dayton street improved?

A. Well, it was improved for several years prior to 1910.

Q. Isn't it a fact, Mr. Icke, that the kind of traffic you now speak of, the hauling of building materials, etc., was carried on to a larger extent on Johnson street than it was on University avenue prior to the improvement in question here?

A. There was more or less of it, yes, on Johnson street.

Q. Well, there was more of it than there was on the avenue?

A. I don't know about that. I haven't any records of the traffic.

Q. You just have your general recollection as you observed it?

A. The grades are a little bit easier on University avenue than they are on Johnson street.

Q. Now University avenue extends from the city limits on the west to what point ?

A. To the intersection of Bassett street and Gorham.

Q. That is, it comes to a dead end at the intersection of Bassett and Gorham streets?

A. Hardly. You would hardly consider it a dead end.

Q. Does it continue beyond those streets?

A. It branches; one direction it goes off as Bassett street, and the other as Gorham street.

84 Q. And instead of considering it as a dead end, you prefer to consider it as branching off into two streets?

A. It is surely not a dead end.

Q. How far is this intersection with Bassett and Gorham streets from Park street?

A. Four blocks, I think.

Q. It is four blocks to the east of Park street?

A. Yes.

Q. And the improvement in question here extended from Park street how many blocks west to Charter street?

A. Three blocks.

Q. Now the traffic from the quarries over University avenue had existed for many years prior to 1910, had it not?

A. Yes.

Q. Was any portion of University avenue improved prior to this improvement in 1910?

A. Yes.

Q. What portions were improved?

A. From Francis street to Bassett, and from Charter street to Breeze Terrace.

Q. How many blocks of improvement does that constitute?

A. Well, it is hard to classify it as blocks. I think the distance is about two thousand feet from Charter street out to Breeze Terrace.

Q. And in the other direction——

A. That is one block, about 400 feet.

Q. And what was the nature of this improvement?

A. The block from Francis to Bassett was limestone macadam on a Telford foundation, and the portion from Charter street to Breeze Terrace was a Telford foundation and one also of limestone, and then a wearing surface of crushed granite.

85 Q. Both of these instances of improvement, were they made at the expense of the adjoining property?

A. They were.

Q. Did they have cement curbs?

A. Cement curb and gutters, yes.

Q. When was the improvement from Frances street to the intersection of Bassett and Gorham streets made, if you remember?

A. Approximately six or seven years ago.

Q. That would make it 1906 or 1907?

A. Yes.

Q. And when was the other improvement from Charter street to Breeze Terrace made?

A. Oh, possibly eight or nine years ago. I don't recall the exact date. I could find out.

Q. That would make it 1903 or 1904 or 1905?

A. That would make it 1903 or 1904.

Q. Has there been any macadam improvement on University avenue since the asphalt pavement was put in in 1910 on the strip in question here?

A. I don't know that you can consider it a macadam improvement. University avenue has been repaired every year or two from Breeze Terrace out to the old city limits, Allen street. It hasn't been assessed to the property owners. The city has paid for whatever work was done there.

Q. And what was the nature of that improvement or repair?

A. Using crushed stone; macadam construction.

Q. Now the traffic that you have spoken of from the quarries and brickyard passed over this macadam improvement from Allen street to Breeze Terrace, and then the macadam improvement from Breeze Terrace to Charter street, did it not?

A. It did.

86 Q. Now in 1910, at the time this asphalt was laid on University avenue, where had asphalt been laid in the city of Madison?

A. The four streets around the capitol square.

Q. And how many blocks were there in each of these four streets as you call them?

A. Two blocks in each one of the streets, or eight blocks all together.

Q. Do you remember when that improvement was made, approximately?

A. About eight years ago, I think; seven or eight. I don't recall exactly.

Q. It would bring it along to 1905?

A. 1904, 1905 somewhere about there, I guess.

Q. So that at the time the asphalt improvement in question here, which was ordered for University avenue in 1910, the only asphalt improvement that had been made in the city was the eight blocks around the capitol square some years before?

A. Yes.

Q. You said something, Mr. Icke, that macadam construction was not suited for the kind of traffic that there was on University avenue. Macadam construction had up to 1910 been the mode of permanent improvement within the city, except for the eight blocks of asphalt that you speak of, had it not?

A. It was the form of construction that was used generally throughout the city, yes.

Q. And as a matter of fact this vitrified brick and cedar block and brick pavements that you have spoken of, those have all come subsequent to this improvement in 1910, have they not?

A. All except cedar block, and that was laid about thirty years ago, I think, around the capitol square. I never laid any cedar block.

Q. That was around the capitol square?

A. Yes.

87 Q. And that had been abandoned?

A. Yes sir.

Q. So that the macadam construction was the generally adopted form of permanent improvement of the streets in the city of Madison at the time that this improvement was made on University avenue, the only exception being the asphalt around the capitol square?

A. Well, that was true on residence or semi-business streets. It wasn't true on our heavily traveled streets, because we weren't improving our heavily traveled streets at that time.

Q. Was there any street in the city of Madison at that time, or had there been any streets by that time, that had been improved in any other way than by macadam, barring only the eight blocks around the capitol square?

A. Yes, we had improved University avenue from Charter to Breeze Terrace, and we used the granite as a wearing material on the surface, because our crushed limestone wasn't able to resist the traffic.

Q. But that was a form of macadam construction, was it not?

A. It was a form of macadam construction, yes.

Q. The only difference was that you used a different kind of crushed rock?

A. A harder material.

Q. A harder crushed rock than the Madison limestone?

A. Yes.

Q. Aside from that, the Madison limestone was the crushed rock that had generally been used?

A. No, we used granite on State street for one-half of its length, and we used granite on King street and on Wilson street; granite on Webster street and granite on Hamilton street, where it ought not to have been used. I guess that's all the streets on which we used granite.

88 Q. That was all prior to 1910?

A. Yes.

Q. But it was what is known as macadam construction?

A. Yes, macadam construction.

Q. Now you said something that the traffic streets were not macadamized prior to 1910. What streets have you in mind?

A. I said that we were not improving our heavily traveled streets.

Q. Which streets did you have in mind?

A. We were principally improving our residential streets.

Q. Which were the streets, the heavily traveled streets, that you had in mind that were not being improved?

A. State street, Park street, Main street, Johnson street,—practically all those streets that we have improved in the last few years, we were using a different kind of material than macadam construction.

Q. Yes, but they had all been improved with what is known as a macadam construction, had they not?

A. Crushed stone had been used on all of them.

Q. And when you use crushed stone in that way, you speak of it as macadam construction, do you not?

A. Yes.

Q. Do you regard asphalt as the proper material to use on streets where you have the heaviest traffic?

A. Well, are you referring now to what is considered as heavy traffic here in this city?

Q. Yes.

A. It will stand under any heavy traffic that we have in this city.

Q. Well, would you recommend the asphalt pavement as a proper pavement for the streets in the city of Madison on which you think heavy traffic is to be carried?

89 A. That depends altogether upon the location of the street and the nature of the traffic, and the nature of the business abutting on the street.

Q. Well, what about taking the kind of traffic that you say was heaviest on University avenue, the hauling from the quarries and from the brickyard and the hauling of loads of wheat by farmers?

A. I would consider the sheet asphalt as a good pavement for that particular traffic.

Q. Would you consider it as good as a brick pavement?

Mr. Ryan: I object to that as irrelevant and immaterial, and for the reason that the only question before the court is whether asphalt pavement is a proper pavement for University avenue.

Court: How is that material?

Mr. Schubring: The only point is this, that this witness has stated, as I understand his testimony, that the macadam improvement was

not the kind of improvement for traffic on that street. Now it appears that macadam was used in every other place up to that time except around the capitol square. Now asphalt is put in. I want to know whether asphalt is the kind of pavement that he recommends or would have recommended as city engineer for the streets on which there was heavy traffic such as he claims there was on University avenue?

Court: That far you have gone, but I don't think you should go farther. Objection sustained.

Exception by defendant.

Q. Wilson street is one of the heaviest traveled streets in the city of Madison, is it not?

A. It is.

M. Ryan: Which street do you refer to now: King, East Wilson or West Wilson?

90 Mr. Schubring: Wilson street in the neighborhood of the North Western depot.

A. Well, you have got to come this way from the North Western. You mean from King street down to Blair street? Wilson street right opposite the North Western depot isn't improved.

Q. Well, take Wilson street from King street to Blair street, which is near the North Western station.

A. That is the street that I based my answer on. I assumed that is what you meant.

Q. What is the nature of the improvement on that street?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained.

Exception by defendant.

Mr. Schubring: The purpose is directed to what I stated to the court before.

Court: Sustained.

Q. What is the effect of heat during the summer months on the asphalt on University avenue?

Objected to as irrelevant, incompetent and immaterial.

Objection overruled.

Exception by plaintiff.

A. It softens it slightly.

Q. And what effect then does this heavy teaming that you have spoken of have on the asphalt?

Mr. Ryan: In order to make the record, if the court please, I want to object to this testimony on the ground that it is irrelevant, incompetent and immaterial, for the reason that when the proper city authorities determine to improve a street, their determination cannot be attacked, unless it is shown to be fraudulent or done corruptly, and that there is no allegation in the answer to sustain any such evidence.

Court: Are you raising any question with reference to the character of the pavement here, in your answer?

91 Mr. Schubring: No, but here is the proposition, as I understand it: The claim is being made through the testimony of this witness that the macadam strip, macadam improvement of the railway strip, was not a proper pavement on the street on account of the traffic that there was on the street, and therefore should have been replaced by the asphalt. Now it seems to me, that issue being raised, the question necessarily follows whether the asphalt pavement which the city put in was any better adapted for the traffic on that street than the macadam which the street railway company had put in between its rails.

Court: I will take the testimony and later consider its effect.

Exception by plaintiff.

A. The only effect that it has is, it shows the imprint of the traffic, the horses' hoofs and the wheels of the wagon.

Q. Does that injure the pavement?

A. It does not.

Q. But after a heavy team with a heavy load has gone over it, the imprint of the wagon and the wheels is apparent in the pavement?

A. Yes.

Q. Now prior to 1910 you said that the city had been improving or repairing their portion of University avenue here in question with crushed stone, from time to time?

A. Yes.

Q. That improvement extended on both sides of the railway strip?

A. Yes, sir.

Q. Along in 1906 the street railway put in heavier rails on University avenue, at least up as far as Mills street, from Park street to Mills street, did they not?

A. Yes.

92 Mr. Ryan: I object to that as proper defensive matter in the answer, not proper cross-examination.

Objection overruled.

Exception by plaintiff.

(Recess until 9 A. M., February 27th, 1913, at which time the trial was resumed.)

Q. You gave some testimony yesterday afternoon, Mr. Icke, concerning the condition of the railway strip on University avenue. To what time did that testimony relate?

A. It related to the year in which we made the asphalt improvement on University avenue and the year previous.

Q. The year 1909, and what portion of 1910?

A. Well, up to about the middle of the year.

Q. Do you recall the date when the improvement of the avenue was ordered by the common council?

A. No, I don't. I think it was early in the year 1910 or late in the year 1909.

Q. You don't now recall the exact time?

A. No, I do not.

Q. Did the board of public works act upon this improvement before the common council?

A. No.

Q. When were your plans for the improvement made?

A. I think early in the year 1910.

Q. Now what was the condition of the railway strip during the summer of 1909?

A. The railway strip, as I said yesterday, was about somewhere in the neighborhood of a foot above the general level of the street.

Q. That was due to the grade that had been given the street railway some years before by you?

93 A. Yes, that was due to the fact that the track should be placed approximately, or as near as possible to the permanent grade.

Q. And it was so placed, was it not?

A. It was so placed. And, as I said yesterday, the strip between the rails, outside of the rails, was filled in with the usual crushed stone, which had worn away in several places. That portion between Mills street and Charter was in pretty good condition.

Q. Now just what do you mean by "being in pretty good condition?"

A. That is, the macadam had gone down somewhat, that is, between the ties, it left it a little irregular, but as I recall the macadam was fairly up to the grade of the rails, and that was true of the portion of the block from Brooks to Mills, but down in the next block, the block between Park and Brooks, there had been quite a little wash in the street, especially that strip between the rails; there is quite a little grade in that block and there is quite a little concentration of water from the hills there, and due to the action of the water and due to the action of the traffic the macadam had been worn away.

Q. By that do you mean that there was some depression in the macadam between the rails?

A. Well, it was a general wearing away and washing away of the material in that block.

Q. What was the situation of the macadam in relation to the rails?

A. It was lower than the rails.

Q. How much?

A. I don't recall exactly, but at the lower end of the block the macadam I should think between the rails was three or four inches below the rails.

94 Q. Would that be true away up to the rails, or just a sort of a depression extending from the rails toward the center of the strip between the rails?

A. More so true in the central portion of that strip between the rails, because that is where the wash and the wear would take place more than anywhere else.

Q. And that wear do you think came about largely as a result of water washing down the grade, and added to that the traffic?

A. Yes, the effect of traffic.

Q. Now the effect of traffic, Mr. Icke, would be, would it not, that the wheels of one side of a wagon or automobile would be run in between the rails and the other wheels outside of the rails?

A. Well, that depends all together on the driver.

Q. Wouldn't that be true usually?

A. Oh, I don't know whether you could say that usually.

Q. Now in the block from Brooks to Park street was there any difficulty in vehicles crossing the track?

A. There was in the lower end of the block.

Q. Just where would that be?

A. In the lower half of that block.

Q. That is, the half of the block toward Park street?

A. Yes.

Q. What would be the difficulty that you had in mind?

A. The difficulty would be due to the fact that the pavement or macadam was lower than the rails.

Q. And whatever difficulty that made for crossing, that would be the difficulty you had in mind?

A. Surely.

Q. It was impossible to cross?

A. You had to exercise care in crossing of course.

95 Q. You have observed teams crossing there while it was in the condition you speak of?

A. Oh, they undoubtedly crossed there, yes.

Q. Now on the other portion of that block and on the other block down to Charter street, there was no difficulty in crossing the tracks with a team or vehicle of any kind?

A. Why, there was some difficulty of course, because it wasn't as smooth as it was when it was originally laid.

Q. But as you consider the fact of rails in the street, with a macadam street on both sides, you would not consider that there was any difficulty in vehicles crossing?

Mr. Ryan: I object to that. The charter provides that it shall be so constructed as to permit vehicles to cross easily and freely.

Objection overruled.

Exception by plaintiff.

A. There was difficulty on those high portions of the street; that is, I mean where the track was above the general level of the street. You had to exercise care in crossing the street railway track anywhere along there.

Q. Well, is it your view, Mr. Icke, that it is impossible to build a macadam road with street railway tracks in the center of the street without having some difficulty on the part of vehicles to cross the tracks?

A. Why, it's more easily to build a macadam road from the outside of the track up to the rails and make it so that it is easily pass-

able, but it's considerably more difficult to do the same thing on the inside.

Q. And that is true anywhere in the city where you have macadam streets?

A. Well, it's generally true of the macadam, because the macadam won't stand that particular kind of traffic that the macadam gets between the rails.

96 Q. But do you mean that when the macadam is new it is possible to cross the tracks without difficulty with a vehicle?

A. No, when the macadam is new and it is filled up flush with the rail, there isn't any great difficulty of course in crossing.

Q. Well, is there some difficulty?

A. There surely is some difficulty.

Q. That difficulty always exists where you have a macadam street, does it not?

A. Well, to a more or less extent, yes.

Q. And do you regard that the crossing on a macadam street, even though it is new, with the rails in the center, is always more or less unsafe for vehicles?

A. I don't say that it is unsafe.

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. I don't know that it is unsafe, but you have got to use a little more care in getting across the tracks.

Q. There is always some difficulty there, is that what you mean?

A. Just what I answered.

Q. Well, what do you mean, that there is always more or less difficulty in crossing the track on a macadam street, even though the street be new?

Objected to as already answered.
Objection sustained.
Exception by defendant.

Q. Had you as city engineer, in the summer of 1909, given any notice to the street railway company that the condition there was such that vehicles couldn't cross readily?

A. That wasn't part of my duties.

Q. Do you know whether any officer of the city did that?

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

97 A. I don't know whether any other officer did. I imagine they did.

Q. Did you make any report to any department of the city government of that condition that you now describe near Park street?

A. It wasn't my business.

Q. And you made no such report?

Mr. Ryan: I object to that as irrelevant, incompetent and imma-

terial, and as calling for a matter that this witness wouldn't have any information of.

Objection overruled.

Exception by plaintiff.

A. I wasn't asked to make any report by anybody.

Mr. Schubring: I move that that be stricken out.

Motion granted.

Exception by plaintiff.

Q. I am asking you whether you made a report.

Mr. Ryan: I object on the ground that if he made a report it would be immaterial.

Objection overruled.

Exception by plaintiff.

A. I made no report to anybody.

Q. Now if the railway strip remained macadam, with the outside asphalt, as you testified yesterday, you said that the macadam would not be as smooth as the asphalt. No I ask you whether the macadam in between the asphalt pavement on each side could be kept so there would be no difficulty for vehicles to cross the railway strip?

A. Why, I suppose it could be kept in smooth condition.

Q. So that there would be no difficulty for vehicles to cross the railway strip?

A. Well, that strip on the outside could be kept in good condition by constant care, I suppose.

Q. But it could be kept so that there would be no difficulty for vehicles to cross the railway strip, could it not?

98 A. Yes, with constant attention.

Q. And what you meant by the macadam strip not being as smooth as the asphalt strip was merely the difference between having a crushed macadam road and having an asphalt road, was it not?

A. The very difference in the nature of the paving material.

Q. Whatever the difference in the smoothness of the two materials was the difference that you had in mind when you said that it would not be as smooth as the asphalt pavement?

A. Well, a little bit more than that. The inherent nature of the roughness of the material itself depends altogether upon whether you keep the material in place or not. If you kept the macadam in place with some sort of a binder, you could keep it smooth, but if you didn't keep it in place you couldn't keep it smooth.

Q. But then you could keep your macadam on the railway strip so that it would be substantially as smooth as the asphalt for purposes of crossing the railway strip?

Mr. Ryan: Objected to as assuming something not in the evidence. The testimony is that the traffic on that street is such that you couldn't keep the macadam in place.

Objection overruled.

Exception by plaintiff.

A. I think it could be kept smooth with constant care, constant attention.

Q. Mr. Icke, you said that University avenue had a width of 99 feet between properly lines, did you not?

A. Yes, sir.

Q. What is the width of the street between the cement gutters?

A. Sixty-two feet.

Q. Can you now state from recollection what the distance of the asphalt pavement is from the cement gutter to the railway strip?

99 A. No, I don't know just what that is. Twenty-seven and a half feet I think.

Q. So that there would be a roadway of asphalt 27½ feet wide on each side of the railway strip?

A. I think that is correct.

Q. Now prior to the improvement of the street with asphalt, where was the heavy traffic on the street?

A. On both sides of the street railway track.

Q. How far from both sides of the street railway track?

A. It didn't confine itself to any particular line.

Q. Was there considerable traffic on the railway strip?

A. There was more or less on the railway strip.

Q. Was there as much there as on the rest of the street?

A. Well, that's pretty hard to say.

Q. Well, was there substantially as much?

A. I haven't any means of determin-g that.

Q. What would you say from your observation of the street and of the traffic on it?

A. I made no observation to determine that particular point.

Objected to as immaterial.
Objection overruled.
Exception by plaintiff.

Q. You made no observations?

A. No, not along those lines.

Q. Isn't it true, Mr. Icke, that travel will naturally go where the road is smoothest?

Objected to as immaterial.
Objection overruled.
Exception by plaintiff.

A. Oh, not necessarily.

Q. Well, would it naturally do that?

A. There are other considerations.

Q. Other things being equal, Mr. Icke, will the traffic not naturally go where the street is smoothest?

100 A. It will go where the grades are easiest, not necessarily where the street is the smoothest.

Q. Now what about the situation of grades there on this portion of University avenue—it is all substantially level, isn't it?

A. No, I would hardly consider that street a level street.

Q. Now taking the grade as you have it there on University avenue between Park street and Charter street, wouldn't the traffic on that street naturally go where the street is smoothest—confining yourself now to that portion of University avenue?

Mr. Ryan: I object to that as not a matter for expert testimony, and merely a matter that the court might take judicial notice of.
Objection overruled.
Exception by plaintiff.

A. It will go where the grades are the easiest; not necessarily where the street is the smoothest.
Q. What do you mean by that, as to this particular portion of University avenue? The grade is the same on both sides of the street?
A. It certainly is not the same on both sides of the street.
Q. Where would it go on University avenue then, prior to the asphalt pavement?

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. You have got to get your question a little more definite. Which way is the traffic going, east or west?
Q. Which way does it go?
A. It goes both ways.
Q. Then take it either way.

Mr. Ryan: I object to the question as not sufficiently definite to enable the witness to answer it intelligently.
Objection sustained.
Exception by defendant.

101 Q. Take the traffic going east.
A. The traffic going east, a large part of it, originally followed, that is, before the street was improved, right close to the stone gutter, because that was the smoothest part of the street and the best grade.
Q. And going west where would it go?
A. Well, it varied. It followed the center of the street or near the center of the street for the first block from Park to Brooks, and when it got over between Brooks and Charter it followed nearer the middle portion between the street railway track and the gutters.
Q. What would be the effect of the traffic, in so far as the street railway strip is concerned, after the street was paved with asphalt—would the traffic on the street railway strip be more or would it be less than it was before?

Mr. Ryan: You now assume that the railway strip is macadamed?
Mr. Schubring: Is macadamed, yes.

A. And the rest of the street asphalt?
Q. And the rest of the street asphalt?
A. It would probably follow the asphalt.

Q. Isn't that on the theory that they go where the road is the smoothest, other things being equal?

Objected to as incompetent, irrelevant and immaterial and assuming that the public haven't the right to use the whole of the street.

Objection overruled.

Exception by plaintiff.

A. I can't answer that question with the word "smoothest" in it. I don't know what you mean by the word smoothest.

—. Other things being equal. You used the word smooth yesterday — connection with asphalt pavement and the macadam pavement.

102 A. They will follow where the grades are the easiest.

Q. You eliminate the question of the smoothness of the road then altogether in matters of the traffic on the street?

A. Oh, no, not necessarily.

Q. Well, what do you mean?

A. I don't know what your question is.

Q. I am asking you, Mr. Icke, whether, other things being equal, taking into account the grade and other things, travel on the street would go where the street was the smoothest?

A. Not necessarily.

Q. Why not?

A. There are other things to be taken into consideration.

Q. What are the other things that you take into consideration?

Objected to as having been gone over.

Objection overruled.

Exception by plaintiff.

A. Well, you have got to take into consideration the transverse slope of the street in determining where the traffic goes.

Q. What else?

A. And you have to take into consideration obstructions that are in the street. Then you have got to follow natural lines of traffic.

Q. Anything else?

A. Possibly.

Q. Anything that occurs to you?

A. Not that I know of just now.

Q. Now the transverse grades on the street affect all portions of the street, do they not?

A. I don't understand your question.

Q. What was the first condition that you put in that you had to consider?

A. The transverse grades affect the lines of traffic.

103 Q. Now that affects all portions of the street, across the street, does it not, at the same point?

A. Not necessarily.

Q. Well, does it on University avenue within the strip here that is under consideration?

A. Transverse grades are quite a little different in various portions of that street.

Q. But at the same point don't those grades extend across the street, affecting all portions of the street at that same point?

A. They do not.

Q. What was the condition, Mr. Icke, of the railway strip in the spring of 1910?

A. I think I testified as to that.

Q. Well, you testified as to the summer of 1909. Was it substantially the same as in the summer of 1909?

A. It was probably not in quite as good condition in 1910 as in 1909.

Q. I am asking you now, not for your inferences, but did you make any observations in the spring of 1910 to see what the condition of the railway strip was?

A. I had occasion to pass over it every day several times.

Q. Well, what was its condition as you observed it there?

A. I think I testified as to that.

Q. Well, what was it? I don't recollect it.

A. Shall I go all over it again?

Mr. Jones: Your attorney will make objections if objections are to be made, Mr. Icke—the attorney of the city.

A. It was in the condition that I testified before, as being the condition that it was in in 1909 and the spring of 1910 previous to its improvement.

103½ Q. Do you know, Mr. Icke, whether or not any repairs were made on the road in the fall of 1909, on the railway strip, late summer and fall of 1909?

A. I don't recall that there were.

Redirect examination by Mr. Ryan:

Q. Mr. Icke, you were asked about a grade given to the street railway company for the building of its tracks in 1906 or 1908. Was that a grade established by the common council?

A. Yes.

Q. You were asked something about the improvement of certain streets with macadam. I believe one of them was that portion of University avenue between Frances and Bassett. Was it improved with macadam?

A. Yes.

Q. What is the nature of the traffic over that portion of the avenue as compared with the portion in question?

A. Why, the traffic on that portion isn't as heavy as on this portion of University avenue that we have considered.

Q. And the portion of University avenue from Charter to Breeze Terrace you testified was improved with macadam with telford foundation and crushed granite above. There was a layer of crushed granite on top, was there?

A. Yes.

Q. What year was that improvement made?
A. I am not certain. I think about eight or nine years ago.
Q. Did that have to be repaired after the improvement was made?
A. It has been repaired since the improvement was made.
Q. There was no crushed granite on the railway strip, was there?
A. I think not—except for the foot outside of the rail. I think there was granite there.

104 Q. Do you know how much repair has been made on the portion from Charter to Breeze Terrace, the nature of the repair there?

A. I know where repairs have been made, repairs have been made in that portion between Warren street and the St. Paul tracks, and between the St. Paul tracks and Breeze Terrace.

Q. Has that method of construction proved to be suitable for the traffic going over that portion of the street?

A. It hasn't stood up under the traffic.

Q. Now you were questioned with respect to the improvement of some other street. I don't know whether you testified as to the character of the improvement. What is the character of the improvement on East Main street that has been made?

Mr. Schubring: As to what time now?
Mr. Ryan: Subsequent. Well, you ask him subsequent to 1910.
Mr. Jones: Well, that is immaterial.
Court: I don't see that that is material.
Exception by plaintiff.

Q. You were questioned yesterday, Mr. Icke, as to how much asphalt work you had done prior to 1910, and I think the testimony showed that there was the portion around the square. That was all prior to University avenue. Was that correct?

A. Yes.

Q. Now had the macadam construction used prior to 1910 on streets in the city where there was considerable heavey traffic proved suitable in general for that kind of traffic?

Objected to as irrelevant and immaterial.
Objection overruled.
Exception by defendant.

A. It had not.

Q. And was there a change adopted about that time with respect to the character of improvements made upon streets subjected to heavy traffic?

105 A. There was.

Q. And that change in general was from macadam to what type?

A. To various types of hard pavements as they are called: Vitrified brick, creosote block, and sheet asphalt.

Q. What has experience shown as to how long macadam pavement will last, leaving the street in a fair condition, under the conditions—subjected to heavy travel—such as on University avenue?

Objected to as irrelevant and immaterial.
Objection overruled.
Exception by defendant.

A. Why, repairs have to begin—it depends upon the nature of the wearing surface, if granite is used repairs don't come quite so soon, are not necessary quite so soon; where the ordinary limestone is used, repairs begin almost immediately after the street is completed.

Q. I understand your testimony is that ordinary limestone is what had been used and was then existing upon the railway strip in 1910?

Mr. Jones: We object to this. It is conceded by us that it was necessary under our charter or franchise to keep this strip inside the rails in repair. These questions go on the theory that we would not keep it in repair or could not keep it in repair.
Objection overruled.
Exception by defendant.

A. That is correct.

Q. It appeared that the wearing of the traffic on the portion of the railway strip between Park and Brooks, followed by rains, had the effect of washing it, had it, Mr. Icke, washing the gravel?

Same objection.
Objection overruled.
Exception by defendant.

A. Washed the macadam.

106 Q. With what effect upon the railway strip?

Same objection.
Same ruling.
Exception by defendant.

A. It had the effect of washing the material away and leaving the strip between the rails as I have already testified.

Q. And that was I believe in some places three or four inches below the rails, was it?

A. Yes.

Recross-examination by Mr. Schubring:

Q. Mr. Icke, you were city engineer for how many years?

A. I was city engineer for ten years, and two years assistant engineer previous to that.

Q. That would go back to what year?

A. 1900.

Q. What was the general type of street improvement in this city in 1900?

Objected to as irrelevant, incompetent and immaterial, and too remote.
Objection overruled.
Exception by plaintiff.

A. Why, macadam was the pavement most generally in use, limestone macadam.

Q. What was the general type of improvement of streets in this city in 1892, if you know?

Same objection.
Same ruling.
Exception by plaintiff.

A. Well, that goes beyond my time.
Q. Do you know what the type was?
A. I wasn't here in 1892.
Q. But didn't you have occasion as city engineer to know what the type of improvement of streets in the city had been?

107 Objected to as incompetent, irrelevant and immaterial and as calling for hearsay testimony.
Objection sustained.
Exception by defendant.

Q. Well, don't you know as a fact what the type of improvement was in 1892?

Same objection.
Objection overruled.
Exception by plaintiff.

Court: Calling for your own knowledge now.
A. Why, macadam, I suppose, was used at that time.

Mr. Ryan: I object, and ask that the answer be stricken out, because it appears that the witness wasn't here and the testimony necessarily would be hearsay.
Motion granted.
Exception by defendant.

GEORGE SULLIVAN, being first duly sworn, testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan:)

Q. Mr. Sullivan, you reside in the city of Madison?
A. Yes sir.
Q. You are street superintendent of the city of Madison, are you?
A. Yes sir.
Q. And have been such for how long?
A. Fourteen years this spring, this coming April.
Q. And that was continuous, was it?
A. Yes sir.
Q. In general what are the duties of the street superintendent?
A. Well, taking care of the streets, repairing, work of that nature.
Q. You do not deal with the original construction or permanent improvement of the streets?
108 A. No sir, I do not.
Q. But all repair work is under your charge, is it?
A. Yes sir.

Q. And during that time you have become familiar with all the streets in the city, I suppose?

A. Yes sir.

Q. Have you observed the effect and character of the material with which streets have been improved?

A. Yes, to quite an extent.

Q. And the effect of the various kinds of traffic upon those streets?

A. Yes sir.

Q. Of course you are familiar with University avenue and surrounding conditions?

A. Yes sir.

Q. As they now exist and as they have existed for the past fourteen years?

A. Yes sir.

Q. University avenue is a broad street, is it, Mr. Sullivan?

A. Yes sir, it is a wide street.

Q. And the traffic from the west comes in, in part at least, over that street?

A. Yes sir.

Q. And what in general is the nature of the traffic over this street?

A. There is quite a large amount of farm traffic from the western part of the country. Then there is quite a lot of very heavy travel from the quarries.

Q. First, how many quarries are there?

A. There are three.

Q. And the stone from those quarries is used where?

109 A. Used on the different streets and buildings all over the city.

Q. The stone is hauled into the city in wagons?

A. By wagons, yes.

Q. What weight of loads, do you know?

A. The loads vary in heft, of course. The average load is 5,500, but they run from that up, 75, 7,700—have in years back.

Q. That is, exclusive of the weight of the wagon?

A. Exclusive of the weight of the wagon.

Q. Now you have this heavy traffic you speak of, produce and the stone traffic. What other traffic over the street?

A. A great deal of pleasure traffic, pleasure driving, automobiles, a good many funeral processions go out over that road.

Q. The cemeteries lie in that direction?

A. Yes sir.

Q. What university buildings lay adjacent or along this street?

A. There are quite a number of those.

Q. Just enumerate them for the record.

A. Ladies' Hall, Lathrop Hall, that building down on the corner of Charter——

Q. The chemistry building?

A. The chemistry building.

Q. And what building or plant is there on the opposite side of the street?

A. The heating plant, but that is down below this.

Q. But it is on University avenue?
A. It is on University avenue.
Q. Of what material are some of those large buildings constructed?
A. Some of them are bricke and some of stone.
Q. And the material for those, was that hauled over this avenue?
A. A good deal of it; in fact all of it.

Q. Now what was the condition of University avenue be-
110 tween Park street and Charter street prior to its being improved with asphalt in the year of 1910?

Mr. Jones: We object, your honor, to this, with the concession that it is our duty to keep the railway strip in good repair, according to the language of the charter. We submit that it is irrelevant and immaterial just what the condition of the streets in the city then were.

Court: I will take the proof. It may all appear as taken subject to your objection, and later consider its effect—that is, all proof with reference to the condition of the street prior to 1910.

Exception by defendant.

A. The street was in a very bad and worn out condition.
Q. Just first will you state the nature of the construction, whether asphalt or macadam and so on?
A. It was a common limestone macadam.
Q. In what condition was that macadam?
A. Well, it was just sim-ly a street that was [illegible]ded out and the crushed stone rounded upon the street.
Q. What effect had this heavy traffic over that street made upon it?
A. It would keep continuously grinding out, got to wearing out in holes, uneven, rough.
Q. How big were those holes?
A. There were some of them quite large at times.
Q. Can you give approximately the dimensions of the holes?
A. There was one hole in particular there at the watering place on the corner of Park and University avenue, it took something in the neighborhood of fifteen or twenty loads of stone to fill it up.

Mr. Jones: It is further conceded that University avenue
111 at the time in question badly needed repairs outside of our strip. We make no contention on that point.

Court: I think I will take the proof and later consider its effect.

Exception by defendant.

Q. You stated the size of the hole down at the end of the street, did you?
A. Why, I should judge that the hole was as large as,—well, it was the full width of the street from the track to the gutter and it was probably thirty or forty feet in length.
Q. And you patched that up, did you?
A. By filling with crushed stone. There was a portion of that hole so bad at times that it was almost impossible for rigs to drive through it.
Q. Do you recall what year it was you filled that?
A. I think that was somewheres about—well, it was about the time

that the top dressing was put on the lower block on the avenue, the block between Charter and Breeze Terrace, as I took a good deal of material out of that street and used it for patching up some of the worst holes.

Q. That was some two or three years before the improvement then?

A. Yes.

Q. Were there other holes along the street other than the one you just testified to?

A. Oh, yes, a lot of them.

Q. What was the size or kind of holes?

A. They were holes I presume some of them as long as an ordinary wagon, that is, where they would start to cutting, and they would cut out rapidly in spots.

Q. What was the condition of the street, more especially in the year of 1909 and 1910?

112 A. The street was in better condition in 1910 than it was in 1909, because we had repaired it in 1909.

Q. You had repaired it in 1909?

A. Yes.

Q. What were your repairs?

A. By hauling in crushed stone.

Q. How extensive were those repairs?

A. Just simply enough to fill up those holes so as to make it safe for travel.

Q. Give us some idea about the number or amount of holes?

A. That is kind of a hard matter to do, because of the fact that it was pretty badly gullied out or gutted out.

Q. Were there quite a large number of loads of stone, Mr. Sullivan?

A. Yes, a large number of loads of stone.

Q. About how many—can you give an estimate of how many you put in in 1909?

A. Oh, I imagine we put in probably 150 yards of stone.

Q. Did you have any repair work in years previous to 1909?

A. Yes sir.

Q. Each year was it, Mr. Sullivan?

A. Generally every season we had to go over it.

Q. There was no curb on University avenue, excepting an old stone gutter?

A. An old fashioned stone gutter.

Q. What was the condition of the railway strip in 1910, Mr. Sullivan, upon that street?

A. The railroad strip had been brought up I guess to grade or supposed grade and it was considerably higher than the remainder of the street. It was that much higher that when that was done we had to put in quite a lot of stone to bring the slope out so that teams could cross it.

113 Q. What was the character of the material between the rails of the railway company there?

A. Why, it was limestone.

Q. In what condition was the surface as compared with the rails of the track?

A. On the inside of course where teams drove there was a kind of a groove worn out along the rail on both sides, that is, on both insides of the rails; some places it would be deeper than others; at intersections of the streets it was worn badly there, because in wet weather the water would remain on the crossings and become quite muddy.

Q. What effect did the rain and the traffic have upon this macadam between the railway track?

A. Why, it would grind out just the same as it would on the outside of the track.

Q. And how deep were those grooves that had been made by the traffic?

A. Why, I should judge they were from two to six inches deep.

Q. You are speaking now between the rails?

A. Just the groove between the rail and the center of the macadam between the tracks.

Q. What do you say, Mr. Sullivan, in the year of 1910 as to the ease or facility with which vehicles could cross the track of the railroad company on this street?

Mr. Jones: This is objected to for the same reason already given.

Objection overruled.

Exception by defendant.

A. Why, by a person being careful they could be crossed all right.

Q. I asked you with respect to the ease with which they could cross.

114 A. Well, it depends upon how they crossed it.

Q. How would they cross it?

A. They would want to go pretty near straight across it.

Q. What would be the result if they attempted to cross the railway track diagonally?

A. If you were running a steel tired rig it would have a tendency to slide along the rail.

Q. For how long a period of time will a street constructed of limestone macadam such as existed in 1910 between the railway tracks on University avenue remain in a reasonably passable condition, being subject to traffic of the kind and nature and amount as that which went over University avenue?

Mr. Jones: I renew the objection.

Objection overruled.

Exception by defendant.

A. It wouldn't remain a great length of time.

Q. Well, that doesn't mean anything, Mr. Sullivan, a great length of time. Can you specify more definitely?

A. Well, the limestone I think would wear out in a year or so, so that it would need repairing, with the travel that was on that street.

Q. Do you consider a macadam construction, consisting of limestone, such as existed on University avenue in the year of 1910, between the railway tracks, a suitable method of street construction for a street subject to heavy traffic such as on University avenue?

Same objection.
Objection overruled.
Exception by defendant.

A. No sir, I wouldn't.

Cross-examination by Mr. Jones:

Q. Mr. Sullivan, you have lived here in the city most of your life?

A. Yes sir.

115 Q. You know, do you not, that in 1892 the mode of street construction generally existing was macadam?

Objected to as not proper cross-examination.
Objection overruled.
Exception by plaintiff.

A. It was chiefly macadam.
Q. Well, in 1892 they weren't using any other kind for street construction?
A. Well, now, I am not positive of that. It strikes me we had a piece of granite top dressing——
Q. Well, I say macadam.
A. Oh, yes sir.
Q. The block system had been tried and given up?
A. Yes, years ago.
Q. And the asphalt hadn't come in?
A. Hadn't come in.
Q. Or brick?

Mr. Ryan: I object to this and move that it be stricken out, for the reason that it is immaterial, and that the rule is that we do not stand still at the place we were in 1892, and that there still may be progress in street improvement although there may be tracks upon the streets.

Court: The answer may stand.
Exception by plaintiff.

Q. Now this University avenue had never been a street very well prepared for travel, had it?
A. It was never a first class street, that's certain.
Q. It had never been genuine macadam?
A. I don't think it was.
Q. They had no curbs?
A. No, they hadn't. They dumped in stone and put crushed rock——

Q. Had they a regular stone foundation for it?

116 A. No, it didn't have a stone foundation.

Q. Simply crushed stone——

A. Built the same as they built streets in the early days.
Q. Put crushed stone on the dirt?
A. Yes.
Q. Was simply a dirt road without the macadam?
A. Yes, there was part of it was dirt road.
Q. You couldn't expect such a street as that to be in a very satisfactory condition?
A. Not with the travel we have got today. I suppose it was a good road at that time, because they did not have the travel there that they are having now.
Q. And there was the further difficulty that the street railway strip had been graded up?
A. Yes.
Q. And you had put on——
A. Quite an amount of stone to bring that to a certain slope so that teams could cross it easily.
Q. But notwithstanding that, a good deal of that heavy travel went along on this strip and wore out the center of the strip?
A. Yes, there was some of that travel went on the center of the strip.
Q. In order to find a smooth place they would go up the slope and drive on the railroad track?
A. Well, not necessarily, no.
Q. Well, they did drive on the railroad track?
A. Some of them did, yes.
Q. And dug it out, as you have testified?
A. Yes sir.
Q. And that is what made the slant from the rails to the center?
A. Yes, that and the wash, the water.
117 Q. There wasn't any system of drainage on that street that was at all satisfactory, was there?
A. Well, the drainage on those three blocks in question there wasn't bad, because it slopes both ways.
Q. You have been in charge of the streets here where they had railroad construction with the macadam quite a good many years?
A. Yes sir.
Q. Now you know, don't you, Mr. Sullivan, that when they constructed their street railway and macadamized it and the street at the side was in good condition, properly macadamized, and properly macadamized inside the rails, there was no practical difficulty in crossing the track?
A. Not while it remained in its new condition.
Q. Of course if the track was too much worn on the outside of the rail or inside of the rail, there would be difficulty in crossing it?
A. Yes sir.

Redirect examination by Mr. Ryan:

Q. Has there been any change in the travel on University avenue, its character and amount, since 1892?
A. Yes sir, there has.
Q. They weren't running automobiles, for one thing, were they in those days?

A. No sir.
Q. The city was a great deal smaller in population in those days?
A. Yes sir.
Q. The city has grown considerably and more especially towards the west end since 1892, has it not?
A. It has.
Q. And what do you say as to the difference in the amount of travel over that street now as compared with 1892?
118 A. Oh, I should think it has more than doubled.
Q. And what do you say as to the amount of stone now hauled as compared with 1892 over that street?
A. It is possibly ten times as much.
Q. There has been an increase in the funeral traffic, has there, since that time?
A. Yes sir.
Q. And that increase and change has been in all kinds of traffic, has it, Mr. Sullivan?
A. Yes sir.

Mr. Ryan: Will it be conceded that the university owns the land on the north side of University avenue from Park street to Charter?
Mr. Schubring: Yes.

J. W. CONKLIN, being first duly sworn, testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan:)

Q. Mr. Conklin, you live in the city of Madison?
A. Yes.
Q. On what street do you reside?
A. I live at 309 North Mills street.
Q. That is close to University avenue?
A. Between University avenue and Johnson, on Mills.
Q. How long have you lived in the city, Mr. Conklin?
A. I have lived in the city all my lifetime.
Q. You have had occasion during the past years to travel over and observe University avenue, have you?
A. Yes sir.
Q. Did you observe the condition of University avenue between Park street and Charter street in the year 1910?
119 A. Yes, I observed it, because I had to drive over the street, or I did drive over the street very often during the day.
Q. And that was a macadam street, was it not?
A. Yes sir, I believe it was.
Q. What was its general condition in 1910, before it was improved with asphalt?
A. The general condition of the street was rather poor. The south side of the railroad track had been improved, I believe, a couple or three years before the asphalt was put in. That was really in a little bit better shape than the University side. That is to say,

from Park street up to Mill- street, they had repaired the south side of the street on University avenue south of the railroad track, and put it in better shape than the university side, the north side.

Q. What was the nature of the repair work done there?

A. I think just crushed stone and screenings on top.

Q. What was the general condition of the street with respect to being even or level?

A. Well, it was rather sloping on account of the raise in the street car track, it left quite a sloping street, sloped towards the gutters on either side.

Q. What was the condition of the surface of the street on either side of the railway strip?

A. Immediately on either side of the railway strip?

Q. Clear across.

A. Well, it was very poor, as I remember it, on the university side, it was very poor. It wasn't quite so bad on the south side of the railroad track. I speak of that street more particularly between Park and Mills street.

Q. You say it was very poor?

A. Yes.

120 Q. What was the condition of the street which leads you to say that it was poor?

A. There were a great many holes in it—well, that is, the poorness of the street was the holes, the chuck-holes, as I would call them, make it hard to drive in.

Q. Now with respect to the railway strip, the portion between the rails of the railway company and one foot on the outside, what was the condition of that in 1910?

A. After they had raised the track they had used crushed stone in between to ballast the track, and put screenings on it, and of course that became worn in the center on account of the vehicles—well, I suppose it would be on account of the vehicles straddling the track and driving down, it left a depression in the center and made it rather choppy to run over it, the macadam would wear out between the ties and leave sort of an uneven surface.

Q. Was that condition of the street noticeable to one who was driving over it in a vehicle?

A. Yes, it would be. It would be noticeable in driving over, either in a buggy—it would be more noticeable I think in a buggy than it would be in an automobile.

Q. You refer to driving over with one of the wheels in between the railway tracks?

A. Yes, one side just straddling the rail and keep the horse either in or outside the rail.

Q. What do you say with respect to the ease or facility with which a person having one wheel in between the rails of the track could cross the track to the other side of the street?

A. Well, I think crossing it with a rubber tired rig it wouldn't be quite so hard, that is, you could cross it at an angle with a rubber tired rig; but with a steel tired vehicle you would have to go more

square, you would have to go across it straight or almost
121 straight, you wouldn't have to go absolutely straight, but you couldn't cross it with so much ease with a steel tired rig, that is, at an angle, because it would possibly slide along.

Q. That is, the surface of the street between the rails was lower than the rail?

A. Yes, I think it was in some places there.

Q. Do you recollect, Mr. Conklin, the condition of the railway tracks, of the space between the railway tracks at the Brooks street intersection, when you went to turn off?

A. I think that the rail was a little higher at the intersection of Brooks street, I think the rail was a little higher, the macadam was worn more from the rail at the intersection of Brooks than it was even between Brooks and Mills, or it was worn a little bit more than it would be between Brooks street and say up to about fifty feet before you would get to the intersection of Brooks street, it seemed to be quite badly worn away at the intersection of Brooks.

Q. Was this quite noticeable as you attempted to cross the track at that point, Mr. Conklin?

A. Yes, it was.

Q. Did it interfere quite considerably with the crossing at that place?

A. Well, I don't know as it interfered very materially, that is, if people would cross it—really the way they most always do, I don't know as it interfered particularly, unless somebody happened to be in there and have a steel tired rig; I have seen rigs slide along, the wheels slide along, from not crossing it, that is, crossing it at too large an angle.

122 Cross-examination by Mr. Schubring:

Q. Now, Mr. Conklin, that you speak of occurs with an asphalt pavement and a steel wheel if you come right up again- the track?

A. I should imagine it would if the asphalt pavement were down from the rail somewhat.

Q. Isn't it a fact that on asphalt pavement, on the inside of the track you have a groove on which the flange of the wheel of the street railway car runs?

A. Yes.

Mr. Ryan: Objected to as irrelevant, and immaterial, and furthermore for the reason that the defendant admits that it is its duty to keep the space between its tracks in such condition that vehicles can cross freely.

Court: The answer may stand.

Exception by plaintiff.

Q. Have you seen or have you yourself had that experience on an asphalt pavement?

A. I have had the experience of driving parallel with the rail and getting down in that groove.

Q. And then as you tried to get out your wheel would slide?

A. Yes sir.

Q. In just the same way that it would on this macadam pavement at Brooks street?

Mr. Ryan: I make the objection that the question doesn't state the conditions which the asphalt pavement is placed in, whether it is down low or up high, which is material for the witness to answer.

Objection overruled.

Exception by plaintiff.

A. I think of course you would slide along. I have slid along on a rail, being down in a groove, upon the asphalt, in trying to pull out the horse I have slid along, I suppose just exactly
123 the same way at the intersection of Brooks street, you slide along the rail there too.

Q. Now you say that you observed the fact that a groove had been worn in the macadam between the rails from the fact that you have been driving back and forth there daily?

A. Yes sir.

Q. Was there considerable traffic along the street there that would drive using the railway strip?

A. Yes, I believe they did use it considerable.

Q. And the groove between the rails was caused by the wearing resulting from that traffic, where the wheels of one side of a wagon would travel in the space between the rails?

A. Yes.

Q. Now this groove that you speak of was deepest about half way between the rails, was it not?

A. Yes, about the center. I think the groove was deepest in the center of the track, in the center of the railroad track.

Q. And would slope from there in both directions toward the rails?

A. Yes sir.

Q. As you observed, people were constantly traveling along the railway strip and the crossing, were they not, that is, with one set of wheels between the tracks?

A. Well, yes, they did. That is about the only way that you could do there, because you couldn't get in between the rails, it wouldn't be advisable to get in there.

Q. That is, the only way you could drive using the railway strip was to get one set of wheels on either side?

A. Yes sir.

Q. One on the outside of the rail and one in between the rails?

A. Yes.

124 Q. Now this choppiness that you speak of, was that between the rails or on the outside of the rails?

A. It was on the outside of the rail. Some people would get their wheel pretty close up to the rail, and they wore something of the macadam away from alongside the rail, but the choppiness that I spoke of was mostly in the middle of the car line. I supposed it was due to the fact that the macadam had worn out between the ties.

Q. As you traveled along there on that strip where you observed

this choppiness, did you see any rods holding the rails together protruding at any point?

A. No.

Q. It was macadam all the way?

A. Yes, I never saw any rods.

Q. To what time does this testimony as to the condition of this street relate, Mr. Conklin?

A. Well, I should judge prior to the putting in of the new street there, right up to the time that the new street was put in.

Court: You mean the asphalt street?

A. The asphalt street, yes sir, up to the time that the asphalt street was put in and a couple of years before that. Of course after the street car company had elevated their tracks there and then put in the macadam and the city I believe had repaired the street on the south side of their tracks, it was in pretty good shape, that is, above the car line and the street; but the automobiles and the vehicles going along straddling the rail on the street car track, why, it soon wore out the macadam; I don't know just about how long it would take, but it wore out the macadam so that it got to be uneven. I think that that was true from Mills street—more true from

125 Mills street to Park street.

Q. That was the portion of the street that you were observing?

A. That was the portion of the street that I traveled mostly, that I noticed mostly.

Q. Isn't it a fact, Mr. Conklin, that the larger portion of the traffic on the street used the street railway strip, for one side, for the wheels on one side of the automobile or the wagon?

A. Well, I think that a large percentage of the travel was done on the street car track there.

By the Court:

Q. You spoke something of the wagons slewing or getting in grooves in the asphalt pavement. What is the fact with reference to their slewing or being affected by the track when they crossed diagonally?

A. What is the effect—do you mean the effect on the buggy?

Q. On the buggy, yes.

A. Well, it would have the effect, in getting it in the groove on asphalt, of sort of wrenching the buggy.

Q. That is, as you cross diagonally?

A. Oh, no, not as you cross diagonally, but going across it diagonally I think you would go over it all right; but it is just when you happen to drive along parallel with the track that you get down in those grooves, and then you would slide along some before getting out of them.

By Mr. Schubring:

Q. The fact is, Mr. Conklin, that it all depends upon how level the improvement between the tracks and on the outside of the tracks is?

A. Yes, it would depend upon that on a macadam street, and it would depend upon that on an asphalt street too.

126 Redirect examination by Mr. Ryan:

Q. You testified to trouble with sliding along on an asphalt street. That would be when you were running nearly parallel with the tracks and getting the wheel in the groove next to the rail?

A. Yes, getting the wheel in the groove next to the rail.

Q. But if you attempted to cross it even on a slight angle, on an asphalt street, where the asphalt street in the center and on the outside is flush with the top of the rail, you wouldn't experience any difficulty?

A. No, I wouldn't expect any difficulty. I think you could go right over that all right.

Recross-examination by Mr. Schubring:

Q. That would be true with macadam or with brick or with asphalt or anything else?

A. Yes, I think it would.

Redirect examination by Mr. Ryan:

Q. But it wasn't true of the macadam as it existed on University avenue in 1910?

A. Well, I don't think it was, no. No, I don't think it was.

Mr. Schubring: We admit that if it wasn't so we were bound to repair it if you asked us to.

JOHN A. AYLWARD, being first duly sworn testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan):

Q. Mr. Aylward, for a number of years prior to last April you were city attorney of the city of Madison?

A. Yes sir.

Q. As such you were a member of the board of public works?

127 A. Yes sir.

Q. For how long a time were you a member of the board of public works?

A. Well, as long as they existed up to that time. That must have been six or eight years. I was city attorney I think fifteen years, and the board of public works was created while I was there, so I was on the board as long as the law provided for a board of public works.

Q. What in general is the duty of the board of public works with respect to street improvements?

A. After the resolution was passed by the council for the improvement of any street, then the board of public works prepared plans

and specifications for the improvement of the street and made a preliminary assessment of the estimated cost of the work.

Q. And that involves a view of the premises, does it not?

A. That involves a view of the street, the condition of the street, and a view of each piece of real estate in any manner benefited or affected by the improvement.

Q. So then since the establishment of the board of public works in the city of Madison you are familiar with all the street improvements done in this city?

A. I think every street that was improved during that number of years.

Q. That is, improved in a permanent manner at the expense of the abutting property?

A. Yes sir.

Q. You were a member of the board of public works at the time the city determined to improve University avenue?

A. Yes sir.

Mr. Jones: It is conceded here in the record that University avenue is one of the broad streets of the city, some 99 feet, I be-
128 lieve, in width between property lines, and we shall not introduce any testimony contradicting the general modes of travel there.

Mr. Ryan: Do you concede that there is considerable heavy traffic there?

Mr. Jones: Certainly. We shall not offer any testimony to dispute that.

Mr. Ryan: Then it is conceded that there is heavy traffic especially some stone traffic over there, of loads weighing from 5500 to 7000 pounds in weight, exclusive of the wagon, and that the traffic is quite large, a great deal of it farm traffic, city traffic, funeral traffic, and especially heavy traffic of farm produce, and from the stone quarries.

Mr. Jones: We concede what the former witnesses have testified on that subject.

Q. Now it appears also that up to that time a great deal of street improvement done in the city had been of the macadam character, different kinds. What do you say, Mr. Aylward, as to whether experience here in the city had demonstrated that the macadam street was of a character suitable for the kind of traffic and amount of traffic which went over University avenue?

Objected to as irrelevant and immaterial.

Objection overruled.

Exception by defendant.

A. It was wholly unfitted, an absolute waste of money in my judgment.

Q. What has the experience been here of the effect of heavy traffic over the ordinary macadam street?

A. It very quickly grinds the stone to powder, and it very quickly, under traffic such as there was on that avenue, and is on that avenue,

destroys the street. Our board came to the conclusion some several years ago that our board never would recommend a macadam
129 street again anywhere except on the side residence streets. By that I mean straight macadam, simply macadam construction.

Q. In your opinion, Mr. Aylward, is asphalt construction, on a concrete foundation, an inch binder with two inches of asphalt on top, a suitable method of street construction for a street carrying the traffic such as that that goes over University avenue?

Mr. Jones: I object to this. It doesn't appear that Mr. Aylward is an engineer or has constructed streets.

Objection overruled.

Exception by defendant.

A. Properly laid I think it is suitable and very highly desirable.

Cross-examination by Mr. Jones:

Q. Mr. Aylward, there are various different kinds of construction that would be as suitable, and as durable as asphalt?

Objected to as irrelevant, incompetent and immaterial.

Objection sustained.

Exception by defendant.

Q. Isn't it probable that brick construction would be more durable than asphalt?

Same objection.

Objection sustained

Exception by defendant.

GEORGE T. KING, being first duly sworn, testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan:)

Q. Your name is George T. King?

A. Yes sir.

Q. Where do you reside, Mr. King?

A. Milwaukee.

130 Q. What is your occupation or business?

A. I am with the White Construction Company; paving business.

Q. Employed in what capacity?

A. As superintendent in charge of the paving.

Q. What experience have you had in street construction work, and more especially in street construction of asphalt?

A. Why, since 1900 I have been constantly in the business, with the Barber Asphalt Paving Company in various cities, with the Parker-Washington Company, and the R. S. Conway Company. I have had charge of work in Cincinnati and Louisville, Indianapolis, in Kansas City, Missouri, in Denver, Salt Lake City, and in Milwaukee.

Q. Were you employed by the Warren Asphalt Company?
A. Yes. That was back in 1891.
Q. When did you begin work for the Barber Asphalt Company?
A. I began with them in 1900.
Q. What work did you do with the Barber Asphalt Company?
A. Had charge of the construction work.
Q. What was the nature of the work?
A. We had asphalt paving. Some streets of course there were no tracks and other streets we laid in connection with the street railway company.
Q. Did you do some work for the Barber people out in Denver?
A. Yes sir.
Q. Was that your first?
A. That was the first that I had charge of the work in, yes sir.
Q. What work did you do in Denver?
A. We paved several streets there. Welton avenue and Colfax avenue were the streets which had the street car tracks on.
Q. In what capacity were you connected with that work?
131 A. Why, I had general charge of the street work.
Q. In what other city?
A. In Salt Lake City we had work where we had street car tracks.
Q. What kind of work did you do there?
A. It was paving with asphalt, and the street car tracks were paved with stone.
Q. You did street construction work?
A. Yes sir, we did street construction work.
Q. This asphalt, is it usually laid upon a concrete foundation, Mr. King?
A. Yes sir.
Q. You paved some streets then in Salt Lake City. What other cities did you work in?
A. Kansas City, Missouri.
Q. What work did you do there?
A. We paved, I guess, I don't know how many thousands yards we did on an average there, two hundred and fifty or three hundred thousand yards a year there for several years.
Q. Two hundred and fifty or three hundred yards of asphalt paving?
A. Yes sir.
Q. And this covered about how many years at that place?
A. In Kansas City, was there two years.
Q. Following that, where were you, Mr. King?
A. I was in Topeka one year, in 1906, and then went to Oklahoma City.
Q. What did you do at Topeka?
A. Resurfaced Kansas avenue.
Q. Under your direction?
A. Yes sir.
Q. You had charge of the work, had you?
132 A. Yes sir.
Q. Then you went to Oklahoma City?

A. Oklahoma City. I was with the Parker-Washington Company in Topeka and also in Oklahoma City; in Oklahoma City for two years for them.

Q. What work did you do in Oklahoma City?

A. Paved a number of streets there.

Q. With what kind of pavement?

A. Asphalt.

Q. And from Oklahoma City, then where did you work?

A. I was in Oklahoma City with the R. F. Conway Company of Chicago.

Q. You went from one company to another?

A. Yes.

Q. And did you do some work with the Conway Company in Oklahoma City?

A. Yes sir, put in about twenty miles there.

Q. About twenty miles of——

A. Asphalt pavement.

Q. And following that what work did you do, where did you go to, Mr. King.

A. I was down in the southern part of the state.

Q. Of Wisconsin?

A. No, of Oklahoma.

Q. Did you do any paving work there?

A. Laid some rock asphalt down there, then I came up to Milwaukee with the White Construction Company last year.

Q. Have you done some work in Milwaukee with the White people?

A. Yes sir.

Q. What work have you done there?

133 A. I laid several streets there: Oakland avenue, Park Place and Kenwood boulevard.

Q. What kind of pavement on those streets?

A. Asphalt. The Oakland avenue and the Park place pavement had street car tracks along.

Q. So that on a number of streets that you have paved there were street car tracks existing?

A. Yes sir.

Q. Now, Mr. King, assuming a street 99 feet in width, between property lin-s and about 66 between the curbs, upon which is located the tracks of the street car company, the street car company's tracks resting upon a bed of crushed stone about six inches deep, and the portion between the rails and the ties being of ordinary macadam, and it has been determined to improve the street with asphalt, resting upon a concrete foundation—what do you say, Mr. King, as to whether it would be good construction to improve the portions of the street to the side of the railway track and one foot distant from the track with asphalt upon a concrete foundation, leaving the macadam between the railway tracks and one foot distant from the outside?

Mr. Jones: Objection to the question as not assuming all the elements that are necessary, and also on the ground that it is not

a question of good street construction, on the ground that the charter only requires us to keep the space between the rails in so as not to interfere with travel, keep it in proper order, and that it does not require us to make original construction of this kind, and that therefore this is immaterial.

Court: What elements are omitted?

Mr. Jones: I haven't had time to think very fully about it.

134 Court: For that reason, what elements are omitted.

Mr. Jones: I don't know now what elements may be wanting.

Objection overruled.

Exception by defendant.

A. It would not.

Q. If under the conditions assumed in that question the portion of the street outside of the railway zone is improved with asphalt, leaving the railway zone with macadam, what in your opinion, Mr. King, would be the result?

Mr. Jones: I object to this as calling for not an expert question, calling for a conclusion to be made by the court, and not stating the things which would probably be necessary to be done in such construction.

Objection overruled.

Exception by defendant.

A. Well, in the first place the macadam is more or less porous, it would allow water to seep through it and get under the foundation of the asphalt pavement, and would have a tendency to allow the traffic to pound the pavement down. In other words, it would take the dirt foundation out from under the concrete up near the edge of the track, and the traffic along that line would have a tendency to pound the asphalt out of line. It might even break off the edge of the concrete. Another effect would be that the asphalt softens up more or less during the summer under heat, and the dirt and the stone drags over onto the asphalt from the macadam and would be ground in and have a tendency to disintegrate the asphalt pavement for some distance back.

Q. Now if the wings of the street had been improved, that is, the portion outside of the railway zone, in that manner, leaving the railway zone with ordinary macadam, and it later became necessary to improve the railway zone in a permanent manner

135 with asphalt or with another permanent pavement, what would be the necessary result of the work of improving that railway strip upon the rest of the pavement in existence?

Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Exception by defendant.

A. Am I to assume that the conditions are as has been stated in the testimony here?

Q. Assuming that the ties on the railway strip project more than one foot beyond the rails, that is, they project some of them as far as

eighteen inches and some of them twelve inches and others at various distances between those measurements.

A. Now as I understand the question, it is relative to constructing a permanent pavement in that track after the other pavement has been laid along the line of that foot outside to lay the asphalt up against?

Q. With the header, if you assume it, or without a header. Assuming that there is a header constructed, with a header against which the asphalt rested.

A. Well, it would be absolutely necessary to change the position of some of those ties, if not all of them, in lining up and surfacing the track. The ties that extended out into the pavement would have the effect of breaking up that pavement. It would be necessary to break up the pavement on the shoulders of the street to get those ties up and get them up to line, and it would be practically impossible, even if the ties were only the full seven feet, to do that work without taking that header out the whole length of the strip.

Mr. Jones: We shall not dispute your claim that asphalt is a proper mode of street construction.

Mr. Ryan: Without conceding the relevancy of it, will you
136 concede that if it is relevant that is a proper mode?

Mr. Jones: Yes.

Q. What experience have you had in connection with other street construction, Mr. King?

A. I haven't laid any macadam.

Q. You haven't had any experience with macadam?

A. Only the results of macadam.

Cross-examination by Mr. Schrubring:

Q. Your experience then, Mr. King, has been confined to asphalt construction?

A. Yes sir.

Q. And you have put in asphalt construction in various cities on streets where there are street cars?

A. Yes sir.

Q. Now it is perfectly practicable, Mr. King, is it not, to build the asphalt pavement in proper manner on both sides of the railway strip and leave the railway strip of macadam or some other kind of improvement?

A. It can be done.

Q. You would do it by placing what you call a header along the railway strip, which would hold the asphalt in, put in your pavement up to that header?

A. That is what I would have to do if it was to be constructed that way.

Q. Well, isn't that what you are constantly doing when you come up against macadam?

A. What way do you mean?

Q. Suppose the street that you are improving with asphalt is in-

tersected by a street that is improved with macadam, what do you do?

137 A. We put in a header.

Q. And you always do that?

A. Yes sir.

Q. And that is the recognized manner of carrying your asphalt pavement up against the macadam, is it not?

A. Yes sir, at intersections.

Q. And in the asphalt construction that you have made in these various cities, you have frequently had to put in these headers on macadam at intersections of streets?

A. We have had to put them in in places, yes.

Q. What is the nature of these headers that you put in?

A. Sometimes they are of oak and sometimes concrete headers.

Q. And they may be granite?

A. They may be stone headers, yes sir.

Q. So that if the street in question here were to be improved with asphalt, except as to the railway strip, the manner of doing that against the macadam on the railway strip would be precisely the same manner in which it is done every time you pass an intersecting street improved with macadam?

A. It could be done that way.

Q. So there is no difficulty about that—perfectly practicable and feasible, is it not?

A. It can be done, but it isn't good construction.

Q. I am not asking you whether it is good construction. I am asking you whether it is perfectly practical and feasible?

A. It can be done, yes sir.

Q. And it is being done constantly, so far as abutting up against macadam is concerned, and all the asphalt pavements that are being put down, whenever you intersect a macadam street, is it not?

A. Yes sir.

138 Q. Now you say that in your opinion it isn't good construction, because the macadam is porous?

A. Yes sir.

Q. What do you do to remedy that if it does exist on your asphalt streets when you pass intersecting macadam streets?

A. Well, the condition is entirely different with a street that joins up to it flush with the pavement, and along a street car track that will have a tendency to be lower than the asphalt pavement.

Q. And your view is that because the street railway track has a tendency to be lower and because it is lower, that's why it is not good construction?

A. The space between the rail and the header would have a tendency to be lower, would wear with traffic, would let water lay in there and seep through, where on an intersecting street it is all laid to a crown and graded to the wings of the street over the corners and drained off to a catch-basin, which wouldn't be the case along a street railway track.

Q. Assume that the space between the rail and your header is flush with your asphalt, then it would not be poor construction, in so far

as seeping water is concerned, would it? I am assumnig now that the space between the rail and the header is flush with the asphalt.

Mr. Ryan: I object to that as assuming something not in the testimony.

Objection overruled.

Exception by plaintiff.

A. If it has enough filler in it to make it non-porous, the water would not go through it. If it hasn't, it wouldn't.

Q. I am speaking of it being flush with the top of the rail.

A. There would be more or less water seep through it every rain at that.

139 Q. But if it is flush with the asphalt pavement, would as much or less water seep through?

A. It would depend upon its porosity.

Q. Suppose you had granite blocks between the rail and your curb, set in the way in which granite blocks are set along the outer rail of a street railway, what would be the situation?

A. There wouldn't be any seepage through it.

Q. And if you had a granite block between the outer rail and your curb, would you say that then there was good construction or poor construction?

Mr. Ryan: I object as the question does not state whether that granite block comes up to the rail within the railway zone or stops one foot beyond.

Mr. Schubring: No, I say from the rail. My question says from the rail to the header which he speaks of.

Objection overruled.

Exception by plaintiff.

A. If that granite block was supported by concrete, I would say it was good construction.

Q. And if it was not supported by concrete?

A. I wouldn't consider it good construction.

Q. Now where do you say that it is poor construction if it is supported by concrete?

A. Because there isn't any such thing as a good construction without concrete.

Q. Well, I suppose all men who are engaged in the business of asphalt pavement would say that, would they?

A. I think that any man that knows anything about any kind of paving would say that it is only as good as its concrete base.

Q. And that no pavement is any good unless it has a concrete base—that is the effect of your answer?

140 A. No pavement, in my opinion, is a first class pavement without a concrete foundation.

Q. So that the porosity of the material between the rail and the header doesn't cut any figure unless you have a concrete base?

A. I don't know whether I grasp that question quite.

Q. Well, you spoke of the question of whether the material be-

tween the rail and the header was porous, so as to let water soak through.

A. Yes sir.

Q. I thought you said that if it was not porous, then no water would get through. Now then we have a granite block, which is not porous, and which you still regard as poor construction, because it has no concrete base. Now then I renew the question, that the porosity of the material you put between the rail and the header doesn't mean anything unless you have a concrete base?

A. No sir, because water could be taken up there underneath through a macadam.

Q. Where would that water come from, from the space between the rails?

A. It might come from there. It might be water near the surface of the ground, that is brought up. Very often they put special drain tile in to take care of water under the concrete foundation.

Q. But that objection you have at all times, haven't you, in your asphalt—any seepage of water that may come up underneath your concrete is always there?

A. Yes, but it won't come through the concrete.

Q. Now then, Mr. King, for good construction how deep would you place the headers?

141 A. Well, that's a difficult proposition to answer. It depends upon conditions.

Q. Take the conditions of this street as they were given to you by counsel for the plaintiff.

A. Well, I imagine they would have to be at least a foot; that is, a foot in depth from the top to the bottom of them.

Q. What would be good construction as to the depth to which these headers should be placed in relation to your concrete base for the asphalt pavement?

A. Whereabouts? Where are you going to use these headers, at intersections?

Q. No, I am talking about the headers along the railroad strip.

A. Well, I don't admit that it would be good construction to put it in.

Q. I am not asking you that, Mr. King. I am asking you what would good construction require. Supposing you were to put in headers, what would good construction require as to the depth of those headers in relation to the concrete foundation of your asphalt pavement?

Mr. Ryan: That assumes the railway strip being left with macadam, Mr. Schubring, and the headers being put in a foot distant?

Q. Just now I don't care what the railway strip is. The asphalt is stopping at the header. Now then if he is putting that in, I am asking the general question as to what would be good construction about that header?

A. It depends altogether on what you are putting that header in for, whether it is permanent for any reason, or whether it is a tem-

porary affair, or what the condition is under which you are putting it in.

142 Q. Let us assume then first that the header is put in there permanently.

A. I imagine, if I was going to put in a header permanently, I would have a drainage and put it in on concrete, if I was going to use an oak header, to keep it from going down under traffic.

Q. If you used a granite header, what would you do?

A. It would be on concrete just the same.

Q. Now then how far would this concrete base on which you would place your header extend into the ground in relation to the concrete foundation for your asphalt pavement?

A. I would put at least five inches of concrete under the header portion of it.

Q. So that the concrete base of the header portion would extend into the ground five inches?

A. Below the header.

Q. Below the header and below the concrete foundation of the asphalt?

A. Yes.

Q. Now why would you do that?

A. To support that header.

Q. Would you do that having in mind the possible flow or seepage of water underneath?

A. Well, I would do it for the reason that a header will not support itself on the ground under traffic. It will go down at a dirt intersection. That has been my experience. I would put it in there for the support of the header.

Q. Without any regard to the seeping of water?

A. Yes.

Q. Now what do you actually do when you come to your intersection of a macadam street?

143 A. Where we put in wood headers, I would dig the trench about five inches deeper than the bottom of the header; we set our header to the contour of the street, and when we lay our concrete we let the concrete go in under the header.

Q. The construction then would be substantially the same as you have just now described for the header here?

A. Yes sir.

Q. You would treat it in just the same way?

A. Yes sir.

Q. Would there be any difference in your construction of the header up against the street railway strip if you assume that *that* the street railway strip is improved with macadam?

A. It wouldn't if I were compelled——

Q. I am not asking you what you would advise. I am asking you what you would do.

A. There would be no difference in the construction if I were to put it in there, no sir.

Q. Now what protection do you put in at your intersections with macadam streets to prevent a seepage of the water from the macadam

streets to get underneath the concrete foundation of your asphalt pavement?

A. Well, you don't have the seepage that you would have in the track, for the reason that the street at an intersection is laid with a crown on it, doesn't run into ruts, and it will drain off to the gutters, which are generally concrete gutters, and the water is carried to catch-basins.

Q. That doesn't answer my question, Mr. King. Do you or do you not provide any protection against the seepage at intersections with macadam streets?

Mr. Ryan: Objected to as incompetent, irrelevant and immaterial and putting up conditions quite different from those which
144 are in issue in this case.

Objection overruled.

Exception by plaintiff.

A. It isn't necessary to do it there.

Q. Well, do you do anything there?

A. Only what I have stated in regard to putting in the headers.

Q. Did you ever put in any asphalt pavement, Mr. King, where the streets that were intersecting the one that you were paving were not improved at all?

A. Yes sir.

Q. With macadam or any other pavement?

A. Yes sir.

Q. They were ordinary dirt streets?

A. Yes sir.

Q. Now what do you do at those intersections?

Q. Put the headers in in the same manner that I would with a macadam street.

Q. What if any protection in addition to that do you put there to prevent the seepage of water, to prevent water by seepage getting underneath your concrete base for the asphalt?

A. Well, that is a condition that you couldn't answer offhand, because you don't state what the shape of the street is and how you are joining to it.

Mr. Shubring: I move that that be stricken out.

Mr. Ryan: I object on the ground that it doesn't state facts sufficient to enable the witness to answer.

Court: The witness has a right to have the facts stated. The answer may be stricken out, but he need not answer until the facts that he wants are stated.

Q. What I am asking you about, Mr. King, is where you are improving one street with asphalt with a concrete foundation, and that street is intersected by a street that is not improved at
145 all, an ordinary dirt street—that being so, you say that you put in your header in the ordinary way, just as you would at a macadam intersection.

A. Yes sir.

Q. Now I am asking you whether in addition to that, at this dirt street intersection, you do anything to protect your asphalt pave-

ment against the seepage of water underneath and getting underneath the concrete foundation of your asphalt pavement?

A. It would depend all together upon the conditions.

Q. What conditions have you in mind?

A. You might be laying the asphalt up on a hill, and there wouldn't be any seepage to look out for, there wouldn't be any flood water or anything of the kind. You might be laying it down at the bottom of a hill, where the grade of the dirt street would be sufficient, the fall would be sufficient to carry the water over the pavement into the catch-basins; there wouldn't be any seepage there.

Q. Suppose you have a level street?

Mr. Ryan: I object to that as not stating facts sufficient for the witness to answer; also as incompetent, irrelevant and immaterial.

Objection overruled.

Exception by plaintiff.

A. Put the header in just as I did and the street would be graded off from the header to allow the water to flow either side.

Q. How far?

A. To the gutters.

Q. How far down along the street away from the asphalt would that be?

A. Depend altogether upon the conditions.

146 Q. Did you ever do any of this grading further than the gutter?

Mr. Ryan: Objected to as incompetent, irrelevant and immaterial, what this witness did.

Objection overruled.

Exception by plaintiff.

A. Why, the gutter is as far as I would ordinarily go.

Q. Aside from this grading that you speak of, have you ever in all your experience in your pavements done anything else where you intersected ordinary dirt roads than to grade the street as you speak of and put in your header in the manner you have described?

A. Not under ordinary conditions, no.

Q. Well, have you ever done it?

A. Yes, I have put drain tile in, put drain tile across the street.

Q. Under what conditions was that?

A. Where there was known to be seep water.

Q. And did you regard the putting in of the drain tile as a sufficient protection?

Objected to as irrelevant, incompetent and immaterial.

Objection overruled.

Exception by plaintiff.

A. Well, that's all I was told to do, and that is as far as I went with it.

Q. Did you regard it as good construction?

A. Under the conditions it was put in, yes.

Q. Now what do you do with the intersections with macadam

streets to prevent the dirt or sand from the macadam streets getting onto the asphalt pavement?

Mr. Ryan: Objected to as assuming that precaution is taken and that the dirt does not get onto the asphalt pavement.

Objection overruled.

Exception by plaintiff.

147 A. We lay our headers as I said flush with the other pavement and if the macadam is broken in any way we put concrete in its place back of the header. That is as far as we go with it.

Q. That is all you do about that?

A. Yes sir, at an intersection. But the traffic over an intersection is crosswise of a street and not lengthwise of it. Consequently there isn't the tendency to ravel an edge.

Q. And you regard that as good construction, the manner you have described?

A. Yes sir, the only thing you can do.

Q. The travel at an intersection, however, is at an angle of the street, so that the sand from the macadam is carried into the asphalt street, is it not?

A. Sand from the macadam is carried over onto the asphalt; if there is any sand on it, it might be tracked into the middle of the street.

Q. Whatever you get from an ordinary macadam street would be carried onto the asphalt?

A. Yes sir.

Q. What do you do if anything at those intersections to prevent the carrying of this sand onto the asphalt?

A. The city cleans the streets.

Q. And do you regard such an intersection where sand may be carried onto the asphalt as good construction?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, because the situation there presented is one where the witness is given the only alternative of doing that and nothing else; quite different from the situation presented by the railway strip.

Objection overruled.

Exception by plaintiff.

A. There isn't anything else you can do but join it.

148 Mr. Schubring: I move that the answer be stricken out.

Motion denied.

Exception by defendant.

Q. Well, is it or is it not good construction?

Objected to as already answered.

Objection sustained.

Exception by defendant.

Q. Something has been said here of the fact that on this particular strip of railway some of the ties would extend more than one foot on the outside?

A. Yes.

Q. Now in placing your header, what would good construction require as to where that header should be placed?

A. It would have to be beyond the end of the ties.

Q. The header would extend below the ties?

A. Yes, sir. Well, no*t*, it wouldn't go away below the ties necessarily.

Q. Would it rest on top of the ties?

A. No sir.

Q. It would have to be up against the ties, because it would go lower than the surface of the ties, wouldn't it?

A. It would have to be outside of the end of the ties, yes sir.

Q. So that this header would have to be placed along the outside of the ties?

A. Yes.

Q. If the ties were longer than a foot, that wouldn't make any difference as to where the header would be placed—it would be placed on the outside, would it not?

A. I don't know. It would depend on whether you were going to run a straight line or whether you were going to run circles.

Q. Yes, but where would you place that header, under what you call good construction?

149 Mr. Ryan: Objected to as incompetent, irrelevant and immaterial. This witness has not testified that that would be good construction.

Objection overruled.

Exception by plaintiff.

A. If you are going to use a header at all, the header would have to be placed in a straight line.

Q. But placed outside of the ties?

A. Placed outside of the ties, yes, sir.

Q. Now whether that distance outside was four inches or six inches or fourteen or sixteen inches wouldn't make any difference, would it?

A. No, sir.

Q. Now having placed your header on the outside of the ties, with the asphalt up against the header, how would a subsequent improvement of the railway strip in any way interfere with the improvement of the asphalt pavement?

A. In order to pave the track afterwards it would be necessary to surface and align that track. In order to do that it would probably be necessary to take those headers out and dress up under the ties, etc., whatever construction you used, and when you got all through you couldn't fit the track to the asphalt.

Q. Now, Mr. King, we have a header on both sides of that track.

A. Yes.

Q. What is to prevent the taking out of the entire track and rails and everything without in any way interfering with your header?

A. There has been work done, if I may make the explanation, where the street has been paved from curb to curb, with a perfect contour and all, and the work carried out in a workmanlike manner,

a trench has been cut through the street and track laid, and
150 there never has been a case where it conformed to the pavement in a first class way, first class manner, with that track. It is absolutely imposible. You can fit the pavement to the track, but you can't fit the track to the pavement.

Q. Suppose that you had two streets, or had one street divided into two parts, with a granite header set down in the middle, and one side of that street is improved with asphalt; do you mean that the other side of that street cannot be improved with asphalt up against the header, without disturbing that header?

Mr. Ryan: I object as irrelevant, incompetent and immaterial and assuming a situation far different from that presented by the issues in this case.

Objection overruled.

Exception by plaintiff.

A. It could be done.

Q. Would that be good construction?

A. I say, I never saw a header left in there.

Q. I am not asking you whether you have seen one. I am asking you whether that would be regarded as good construction?

A. It wouldn't be regarded as good construction, no.

Q. Because the header was left in?

A. Why, it isn't the intention of a pavement to have a stone line run down through the middle of it. There wouldn't be anybody specify any such condition as that.

Q. But is it good construction, Mr. King, to build your asphalt one year or one month up against the one side of that header, and build an asphalt or macadam the next month or the next year up against the other side of that header?

A. They take the header out when they do that.

Q. I know, but would your construction on both sides of that header be good construction?

Mr. Ryan: I object to the question, because the question itself assumes an absurdity and then asks the witness to answer
151 whether it is good construction.

Objection overruled.

Exception by plaintiff.

A. The header would be taken out.

Q. Assuming the header remains in, would your asphalt pavement on the one side and your asphalt pavement on the other side be regarded as good construction?

A. Yes, the pavement would be good construction on either side of the header.

Q. You think, however, that to leave a header in a street, a granite header, is not good construction?

A. Well, I think you are making it a misnomer. It isn't proper construction.

Q. Well, is it good construction?

A. I wouldn't say it was, to lay it down through the shoulde of the street.

Q. What do you say as to the asphalt pavement around the capi tol square, which you have seen, have you?

A. No, sir, the snow is on it.

Q. Then I ask you what do you say as to whether an asphal pavement on a street on which there are street cars, with granite blocks a foot wide on the outside of the rail, and flange granite blocks six or eight inches long on the inside of the rail, thus giving you two granite strips in the middle of the street—whether that is or is not good construction?

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. It's a necessary proposition to have that. If the track is in the street, it is a necessary proposition to meet it. If you have a street without any track in it, it would be absolutely unnecessary and foolish to have a header down through the center of it.

152 Q. But if you have a street railway there and you put your granite block on the inside and on the outside of the rail, that is good construction, is it not?

A. If it is properly laid, yes, sir. It is necessary.

Q. Now, on the question of whether or not that is good construction, does it make any difference whether the granite block that you put on the outside is 10 inches or 12 inches or 14 inches long?

A. How do you mean, lengthwise of the street?

Q. At right-angles to the rail.

A. No, I don't know as it does.

Q. So that if you have a granite header up against the railway right of way, and you place a granite block from the rail out to the header, so that the presence of the header merely increases the length of your granite zone—that is good construction, is it not?

A. Providing it is properly put in, yes, sir.

Q. And after such a header has been put in on both sides of the street railway strip, and assuming that the street railway strip is macadam, the question of replacing that macadam subsequently by brick or asphalt or some other improvement is merely a matter of expense, is it not?

A. Yes, it would be a matter of expense and—it would be a matter of expense, yes, sir.

Q. Is it easier to replace macadam in such a place than it is to replace asphalt?

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. How do you mean?

Q. Well, the ease with which the operation can be performed is concerned.

153 Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. I don't know whether it would be easier or not.
Q. And you say that because you have had no experience with macadam?
A. No, because I don't know what the conditions would be under which you had to relay it, what you would have to do.
Q. What would be true generally, as to whether it is easier to relay macadam or to relay asphalt?

Objected to as irrelevant, incompetent and immaterial.
Objection overruled.
Exception by plaintiff.

A. That depends altogether upon conditions.
Q. As a general proposition, assuming the same conditions, is it easier to relay macadam than it is to relay asphalt?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial. It doesn't state facts sufficient to enable the witness to answer. No facts stated as to where you would get the material, the prices of it, or time, or anything of that nature.
Objection overruled.
Exception by plaintiff.

A. How far do you go in replacing the asphalt?
Q. Replacing the pavement, whatever the asphalt pavement is, and whatever the macadam pavement is?
A. I would say it was easier, if you had to replace just the surface of the asphalt, it would be easier than it would be to replace the entire amount of macadam.
Q. But what about the entire replacement of the asphalt pavement?
A. It wouldn't be necessary to replace the concrete.
Q. If you had to replace the concrete, it would be easier?
154 A. It would be easier to dig out macadam than it would be the concrete.
Q. You have never had any experience with the construction of street railway tracks, have you?
A. Not the entire construction of it, no, sir.
Q. You have had some?
A. Yes, sir.
Q. What would you say, looking at it from the point of view of repairing the right of way of the railway zone, the rails and whatever other repairs are necessary on these street railways, as to whether it is easier to make such repairs when your railway strip is improved with macadam than it is when it is improved with asphalt?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, and I don't see how the testimony could be admissible on the theory that it could be made the easiest for the street railway company to do its work.

Objection overruled.
Exception by plaintiff.

A. I don't know. I never had anything to do with repairing one with macadam.

Q. From your general knowledge you are not in a position to answer that question?

A. From my personal knowledge, actual knowledge, I have never seen a paved street with a permanent improvement in it, with a street railway track presumably permanently paved with macadam. They have always had some kind of a permanent pavement in the track.

Q. And by a permanent pavement what do you mean?

A. I mean a pavement on concrete.

Q. How long have you lived in Milwaukee, Mr. King?

A. I have been there since last fall.

155 Q. You are more or less familiar with the pavements that have been put in in Milwaukee within the last year?

A. Yes, sir.

Q. And also with pavements on streets where there are street railway tracks?

A. Yes, sir.

Q. Are you familiar with the pavement that has been put in on Vliet street?

A. No, sir.

Q. From Twentieth to Twenty-seventh street?

A. No, sir. I have never been over that strip.

Q. Do you know that that Vliet street is improved, permanently paved with asphalt?

A. No, sir, I don't know anything about Vliet street. I have never been on it.

Q. You don't know anything about that?

A. Not about Vliet street, no, sir.

Q. Are you familiar with the improvement on North avenue, from Fond du Lac avenue to Teutonia avenue, about three-quarters of a mile?

A. No, I wouldn't say I was familiar with it. Our work was all over in another section of the city, I never paid very much attention to that.

Q. Do you know that that avenue within those streets is paved on the outside of the right of way or railway strip with asphalt?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, not proper cross-examination, not stating the conditions under which it was paved.

Objection overruled.
Exception by plaintiff.

A. I don't know anything about it.

Q. Do you know how the street railway strip is improved on that street?

156 A. No, sir.

Q. Are you familiar with the improvement on National

avenue in Milwaukee from Thirtieth to Thirty-third street, about a third of a mile?

A. I have ridden over it in the cars, but I never paid any particular attention to it.

Q. Do you know that that improvement outside of the railway strip is asphalt?

A. I think it is, yes, sir.

Q. Do you know what the improvement in the railway strip is?

A. No, sir, not positively.

Q. Do you know that it is macadam?

A. I believe it is penetration macadam, I am not sure.

Court: What do you mean by penetration macadam?

A. Penetration macadam is a macadam or stone that is held together by asphalt cement. The asphalt cement is poured over the rock and goes down through it and binds it together, makes it waterproof.

Q. It is a macadam where you use some sort of oil?

A. No, sir, asphalt cement.

Q. Do you know that that was used on this portion?

A. If it is penetration macadam it was used.

Q. Do you know that it was penetration macadam?

A. No, sir, not positively.

Q. You know it was some macadam?

A. I know if it is a macadam, it is an asphaltic macadam.

Q. Do you know that the railway strip, on the portions of Vliet street and North avenue that I have called your attention to, has been improved with a macadam?

Court: He said he doesn't know anything about those streets. Why spend farther time.

157 Q. What protection do you put in on the side of your streets to prevent a seepage of water from the grass plot between the curb and the sidewalk, or from the other side of the sidewalk, from seeping underneath the concrete foundation of your asphalt?

Objected to as irrelevant, incompetent and immaterial, having no bearing upon the issues in this case.

Objection overruled.

Exception by plaintiff.

A. Where it is known that water seeps through, that there are springs or something of the sort back of the curb, there is drain tile put in under the curb, which takes care of it. Under ordinary conditions, without any known seepage of that kind, the curb is below the bottom of the concrete, or else you are laying up against a curb and gutter.

Q. But wherever you find that there are springs or that there will be considerable seepage, you have a way of taking care of that seepage?

A. Yes, sir.

Q. And leaving your asphalt construction up against the curb—good construction?

A. Yes, sir.

Redirect examination by Mr. Ryan:

Q. Mr. King, if the wings of the street were improved with asphalt and a header placed at the end of the asphalt as assumed in counsel's question, where the ties project more than one foot beyond the rails, you would have to place your header say at the edge of the ties?

Mr. Jones: I think this testimony with respect to some of the ties projecting is immaterial, and the testimony connected with it. It would be within the power of the city, if it is desirable, to have those ties cut off and to have them uniform, it is within the
158 power of the city to put their curb as they want it. It would be absurd that the construction of the track should be circular or irregular. I submit we ought not to assume that it would be so.

Objection overruled.

Exception by defendant.

A. The header would have to be placed at the outside of the ties and the ties would have to be cut off.

Q. If you placed your header at the outside of the ties and you run it straight through, you would have a straight line six inches beyond the railway zone, then you would have a six inch strip between that header and the railway zone. What are you going to put in there, that six inch strip?

A. Fill it up with dirt, I guess.

Q. Now then there would be some asphalt there, would there, inside the header on that six inch strip?

A. There would be a space in there.

Q. There would be a space in there that you have to take care of?

A. Yes, eventually.

Q. If you brought your header in to the six inch space and your ties projecting beyond that, you would have to have your header rest on the ties?

A. Yes, sir.

Q. And then if the track was taken up and improved, you would have to take up your header, or else leave the header out on that six inch strip, and take care of that six inch strip?

A. Yes, sir.

Q. Would either such method of construction be good construction?

A. No, I don't think it would.

Q. When you are improving an asphalt street and you come to a street intersection which is improved with macadam or is
159 not improved at all, you there have to either put in a header or else let your asphalt run out flat?

A. Yes, sir.

Q. It isn't a question of good construction, is it?

A. It is a question of having to meet the condition.

Q. It is a question of having to meet the condition that you face?

A. Yes, sir.

Q. And that is the only thing you can do, put in a header?

A. Always put in a header so as to get a shoulder for your asphalt.

Q. That doesn't necessarily insure, if there is any loose sand or dirt, that it will not be carried upon your macadam, does it?

A. No, sir.

Q. Whatever work you do to take care of the water seepage is the work that you have to do by being faced with that condition?

A. Yes, sir.

Q. Whereas in dealing with a street improvement, with a street railway track, the question there is what is good construction, is it not?

A. The question there is a condition, the condition of the track being there, and to meet it with the best possible construction.

Q. And to meet it with the best possible construction, you would not stop with a curb twelve inches or eighteen inches from the rail, would you?

A. No, sir, good construction would require that the pavement meet the track at the time it was being laid.

Q. And you were asked about certain conditions of asphalting of a street with a header right down through the center. Would any condition of asphalting with a header through the center be good street construction, Mr. King?

160 A. No, it would be bad construction to lay the street that way in the first place, to run a joint in asphalt straight down through the center of the street.

Q. Have you ever observed or heard of such a proposition in actual street construction?

A. No sir.

Q. And assuming that you laid a street with asphalt, with a header down the center, both sides of which are asphalted, and later you attempted to take out the asphalt that has been worn away presumably, could you practically remove that asphalt in any way without disturbing or injuring that header?

A. You could remove the asphalt without disturbing the header necessarily.

Q. How would you do it?

A. You could chop that out with axes.

Q. The header would take its chances on the chopping of the asphalt?

A. You would chop away from your header. I can't assume a condition with a header down through the center of a street, because there wouldn't be one laid.

Recross-examination by Mr. Schubring:

Q. If none of the ties were more than a foot outside of the rail, those being outside, the excess being sawed off or taken care of in some other way, so that you could have your uniform line of header one foot on the outside of the rail, and you put in the header as you

said it required to be put in in good construction, that then would be good construction, wouldn't it?

A. You mean so far as the outside, the wings of the street?

Q. The outside of that header is concerned?

A. Yes sir, that would be good construction.

161 Redirect examination by Mr. Ryan:

Q. Treating the street as a whole and not separating it into two wings, would you say that was good street construction?

A. To put a header down through?

Q. Yes.

A. No.

Mr. Schubring: A header on each side?

A. And leaving a space out in the center?

Mr. Schubring: Leaving the railway zone in the center to be improved in some other way.

Mr. Ryan: Stopping with headers a foot distant from the rails.

A. Why, if it was to be left permanently there, and the other to be put in right at that time and joined right up to it——

Q. No, I assume the conditions where the street is improved with asphalt up to one foot from the outside, and your headers are in there, and your macadam is in the center, would you consider that good street construction?

A. No.

Recross-examination by Mr. Jones:

Q. Suppose you have a street a mile long; it couldn't be street construction, could it, to have the center of the street parked and asphalt on each side?

A. Yes, with a curb up at the sides to protect it.

Frank W. Blodgett, being first duly sworn, testified in behalf of the plaintiff as follows:

(Examined by Mr. Ryan:)

Q. Where do you reside, Mr. Blodgett?

A. Milwaukee.

162 Q. What is your profession or occupation at the present time?

A. I am at present superintendent of street construction.

Q. With the city of Milwaukee?

A. Yes sir.

Q. What are the duties of the superintendent of street construction in Milwaukee?

A. To prepare the plans and specifications for new work, to superintend the construction of new work, and also to look after the repairs of the old work.

Q. Of all the street work in the city?

A. Of all the street work in the city.

Q. How long have you filled that position, Mr. Blodgett?

A. About a year.

Q. And previous to occupying the position of superintendent of street construction, what experience had you had with street construction?

A. I was a practicing civil engineer in private practice for about four years, and during that time I made plans and specifications for street work in various places. I was for three years connected with the city engineer's department in Milwaukee and while in that position we had the laying out of the street work. For several years I was park engineer for the city of Milwaukee and had charge of the construction of the streets and roads through the parks. As assistant engineer of the Wisconsin Central I had some little work to do with the paving around the tracks and in the yards of the Wisconsin Central Railway.

Q. How long were you in the engineer's office in Milwaukee?

A. Three years.

Q. And during that time — did you have to do outside of preparing plans and specifications?

163 A. I was connected with one of the outside [illegible]ces, the division engineers as they were called there, and we had charge of the street work as far as seeing that the work was properly performed in accordance with the specifications, and laying out of the work, superintendence of the work.

Q. What kind of street construction was done during those three years in Milwaukee?

A. Block pavements, brick pavements, macadam pavements. I don't think at that time there were any asphalt pavements laid, or if there were, there were very few. That was quite a number of years ago. Also granite block pavements were laid at that time.

Q. Did you have anything to do while in private practice with the construction of any asphalt pavements?

A. Not with asphalt. With the block pavements, and brick pavements and macadam pavements, concrete pavements; asphalt pavements have come in later. I have had charge of their asphalt pavements since I have been superintendent of street construction.

Q. During the past year in Milwaukee has there been considerable asphalt pavement done?

A. Laid about three hundred and fifty to four hundred thousand square yards.

Q. Of asphalt pavements?

A. Of asphalt pavements.

Q. During this past year have you had occasion to inspect the asphalt work previously done in the city, or some part of it?

A. Oh, surely. We had the maintaining of that. Milwaukee has quite a large amount of asphalt pavements that have been in there for a number of years, anywhere from ten years, laid ten years, down to the present time, and those pavements, which were com-

164 mencing to go to pieces, we had charge of the repairs of that and superintending the repairs of those pavements.

Q. Do you consider it good street construction to improve the street with asphalt upon a concrete foundation, in which street there is a street car line, by improving the portion of the street from the

curb up to the railway zone, which stops one foot outside of the rail, and leaving the railway zone of macadam construction?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception by defendant.

A. Our experience in Milwaukee——
Q. Well, first what would be your answer to that question?
A. It is not good construction.
Q. Would you consider a macadam construction for that portion of the street occupied by railway tracks good construction for a street over which the traffic consists of a great deal of heavy traffic of stone, the loads of which weight from 5,500 to 7,000 pounds exclusive of the weight of the wagon, which is about 1,800, and other heavy loads of farm produce, besides the other traffic which goes over the street of a lighter kind, the macadam being a comparatively soft limestone?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception by defendant.

A. I would not.
Q. If a street were constructed with asphalt upon a concrete foundation, upon the sides, the asphalt work stopping a foot outside of the railway track, and the railway zone being left with macadam construction, what would be the natural result and effect upon the asphalt?
A. One of the principal troubles is that the macadam in the street railway zone, being of a nature that picks up or ravels under
165 traffic, is that in the summertime, when the asphalt is naturally somewhat soft, the stones and dirt are carried out onto the asphalt by the traffic inside of the street railway zone and is ground into the softened asphalt by the traffic on the asphalt itself, and disintegrates or destroys the asphalt. Then there is another objection that we have noticed there in a great many cases, the rutting of the macadam along the asphalt, and consequently a team turning out onto the asphalt from the street railway zone wears away the pavement, the asphalt pavement. Of course we have the further objection, although it is not a particularly serious one, and that is the percolation of the water through the macadam and softening up the foundation underneath the asphalt pavement.
Q. Now where the ties of the railway extend in some instances six inches beyond the railway zone——

Mr. Jones: Of course I understand this is taken subject to the objection as to the former testimony. We have objected to the former testimony of this same character, and the court at one time made the remark that it was taken subject to the objection.

Court: Well, that was with reference to the former condition of the street.

Mr. Jones: We desire to renew our objection to all testimony of this character.

Court: Just let the record show what you object to.

Mr. Jones: I object to it for the same reason I objected before.

Court: What line of testimony?

Mr. Jones: Testimony as to the fact or claim that damage would be done to the asphalt if the other was not kept in repair,
166 because we concede it was our duty to keep it in repair. Wherever we are obliged by the ordinance to keep the streets in repair, our concession is that we are obliged to keep it in repair, and the assumption that we would not——

Court: I don't understand that this witness' testimony, so far at least, is based on the assumption that the macadam is not in repair; at least he has not so testified thus far. I want the record to disclose any objection you want to have made, but I don't understand to what testimony you are objecting.

Mr. Jones: Well, we do object—I don't remember exactly what the question was—the effect upon the asphalt if macadam construction is used.

Court: Let the record show that that testimony is taken subject to the objection that has been made, and overruled.

Q. If the ties of the railroad project in some instances six inches beyond the railway zone, Mr. Blodgett,—by that I mean 18 inches beyond the rails—would it be practical to take care of the street outside of the railway zone by any means of asphalt construction and leave it in reasonably good shape?

Mr. Jones: We renew the objection, the same reason.

Taken subject to the objection.
Exception by defendant.

A. You mean you have the paving of the wings of the street up to the railway zone?

Q. Yes.

A. No.

Q. It would not?

A. No.

Q. That is, the extra projection of the ties would have to be removed, would they?

167 A. The construction could be made without removing the ties. In fact it has been made in certain instances that I know of without removing the ties.

Q. But would you call it good street construction?

A. No, I would not, not when you take into consideration the fact of the necessity of possible future repairs to the street railway company's tracks.

Q. Now in asphalt construction when you come to an intersecting street which is improved with macadam or is an ordinary dirt street, what protection or provision do you make there for holding the asphalt on the street?

A. We put in at the end of the asphalt pavament what is known as a header. Sometimes construct that with a stone curb, sometimes with a plank curb, but more frequently we make this header mono-

lithic with the foundation of the asphalt pavement, that is, the foundation is brought out a distance of four to six inches beyond the end of the asphalt pavement and then built up to the height of the asphalt surface to conform with the crown of the street.

Q. By reason of the fact that you are improving the one street and meeting this dirt or macadam work on the other street, you are compelled by the necessity of the case, are you, to make some such provision?

A. We have to have something solid for the asphalt to abut up against.

Q. Does that header you mention prevent any loose sand or dirt that might be on the adjoining street from being carried over onto the asphalt?

A. Not at all. They are merely there for the purpose of holding the asphalt in place.

168 Q. If you had a street improved on the sides and up to the railway zone with asphalt upon a concrete foundation and the railway zone left with the ordinary macadam, and later it was found necessary to improve the railway zone with asphalt upon a concrete foundation of some other similar permanent pavement, could you do that and leave the street and have it done in a good workmanlike manner and leave the street in good condition?

Objected to as incompetent, irrelevant and immaterial.
Objection overruled.
Exception by defendant.

A. The work could be done and the street probably left in a safe condition, but it is a practical impossibility to make a workmanlike job, that is to say, leave the job in as good condition as it would have been had the work all been completed in the first instance.

Q. Then you would say that the proper way of doing it would be to do it all at the same time?

A. Yes sir.

Cross-examination by Mr. Schubring:

Q. It is practicable, isn't it, Mr. Blodgett, to put your header as you call it along the outside of the railway zone and build your asphalt up to that header?

A. Yes sir, that can be done.

Q. That would be merely extending in a large way what you do at every street intersection where you hit macadam or dirt roads?

A. It would be extending the street railway zone.

Q. There is no protection that you use, is there, to prevent the sand or stones from a macadam road or street being carried onto the asphalt at junctions?

A. No, there is not.

169 Q. And where you use these headers, whether you have them of granite or of cement or some other material, even though the macadam should wear away, there is no breaking away of the asphalt, is there?

A. Not unless the header is worn away also, which frequently hapns, where it is backed to the asphalt and then the asphalt disingrates.

Q. The header performs not only the service of holding the asalt, but protects it against breakage?

A. Is a protection also, yes.

Q. And that condition would exist on your macadam street intertions just as it might on this street railway zone with your header ong both sides of it?

A. Just the same, yes sir.

Q. There is no objection from the point of view of traffic if the ilway zone is built of macadam and kept in repair, that there would any interference of vehicles crossing the railroad zone at any point, uld there?

A. You mean as to the difficulty of crossing the railway zone?

Q. Yes.

A. Assuming of course that the macadam is always kept in pert repair.

Q. Kept in repair.

A. No.

Q. You would have a comparatively smooth street the entire dth of the street, except that part of it was asphalt and part of it is macadam?

A. Yes sir.

Q. And if the macadam is kept in repair there would be no greater fficulty in crossing the railway strip than if you had granite blocks or asphalt up to the tracks and between the tracks?

A. Nothing, except possibly a little rougher pavement.

Q. And that roughness of the pavement would be due to e fact that it was macadam and not a smooth asphalt?

A. Yes.

Q. If granite blocks were used altogether there might be just as uch roughness then?

A. Always assuming that the asphalt is in perfect repair.

Court: What do you mean by macadam being in perfect repair?

A. No ruts, no loose stone, and kept up with the proper surface, with the surface of the track and even with the balance of the vement.

Q. Well, even suppose, Mr. Blodgett, that there were equal wear between the rails on the macadam, that would offer no difficulty in ossing, no substantial difficulty in crossing the railway zone?

A. In crossing at right-angles to the railway zone?

Q. Yes.

A. No.

Q. And even crossing it obliquely, it might cause some difficulty, t not substantial difficulty in crossing?

A. Not more so than with another pavement.

Q. There would be more difficulty perhaps than if you had an solutely smooth hard surface like asphalt?

A. Oh, yes.

Q. The groove right at the rail in which the flanges of the wheels travel has to be there whether you have asphalt or whether you have macadam?

A. The wheels certainly have to have a place to travel.

171 Redirect examination by Mr. Ryan:

Q. If the macadam on the street between the railway zone was not a suitable improvement for the street because of the heavy traffic to which the street is subjected, then as a practical proposition in the course of the use of the street what would be the effect of the traffic on the macadam close to the header?

A. The macadam will rut very rapidly. Limestone is a soft proposition and easily wears, and where the traffic follows in lines, as it naturally does along street railway tracks, not crossing the rails from one side to the other, but one following directly behind the other, the ruts form very quickly and necessitate almost constant work for repairs.

Mr. Jones: You mean repair inside the rails, or do you mean repair of the asphalt?

A. No, of the macadam.

Q. Theoretically, if the macadam is at all times kept flush with the rails, you would experience difficulty in crossing the track particularly?

A. That's all based on the theory that we are keeping our macadam just right, in proper condition.

Q. And by that you mean level, practically level with the rail?

A. Yes.

Mr. Jones: I suppose it is understood that this testimony is objected to, about the difficulty of keeping it in repair?

Court: It may be taken subject to your objection if you desire.

Mr. Jones: We object to it because the franchise assumes that it will be kept in repair.

Q. As a practical proposition, Mr. Blodgett, is it feasible to keep macadam in that kind of repair so that you will have no diffi-
172 culty in crossing the tracks, where the outside of the street is subjected to travel and the inside is, and the outside of the street is paved with macadam, and the inside is subjected to heavy travel, such as that which passes over University avenue, loades of 5,500 and 7,000 pounds weight?

A. It is not a practical proposition.

Mr. Jones: Objected to. The franchise fixes that, we submit, and it is not to be assumed that they were imposing an impossible thing.

Objection overruled.

Exception by defendant.

A. It is not a practical proposition to try to keep that in continual good repair under those conditions.

Q. And the inevitable result under those circumstances would be what?

A. The macadam ruts and develops holes and makes dangerous conditions for travel.

Q. If the macadam is worn away by this traffic close to the header, what effect will that have upon the asphalt close to the header, if any?

A. In the first place, in the turning out of the vehicles from this rut, it will wear the header and as the header wears off it eventually gets back into the asphalt and commences to wear away the asphalt.

Recross-examination:

Q. Are you assuming here, Mr. Blodgett, that all of the traffic on this street will continue to travel on the street railway zone?

A. Oh, no, not at all.

Q. You appreciate that there is on each side of the street railway zone an asphalt street twenty-seven and a half feet wide from the zone to the curb?

173 A. I know it is pretty wide up there.

Q. You would expect, would you not, that some of the traffic at least would travel on the asphalt?

A. I would expect that the traffic would certainly take to the best part of the street.

Q. And if that is so, wouldn't practically all of the traffic be along the asphalt portion of the street?

A. It certainly would if I had anything to do with it.

Q. And if that is so, then would it be impossible or impracticable to keep the macadam strip in the railway zone in repair?

A. Not if you are going to keep all the traffic off of it.

Q. Suppose you keep a good share of the traffic off of it?

A. Of course that depends upon the nature of the traffic that was left on the zone. If it was lighter traffic it would be much more easy to keep it in repair than if there is a portion of the heavy traffic on it. Heavy traffic would tend to disintegrate it more than the lighter.

Q. What would naturally happen to the traffic on a street like this, to the heavy traffic, would it take the 27½ foot strip of asphalt, or would it get onto the street railway zone with the necessity of turning in and out constantly as cars came along the street—what would you say?

Mr. Ryan: I object to the question for the reason that it assumes that the railway zone is to be in a different condition from the rest of the street, which I think cannot be assumed under their own construction of the franchise.

Objection overruled.

Exception by plaintiff.

A. Traffic, as I said before, would naturally take the best part of the street; that is, the street that was paved with asphalt and not with macadam.

174 Q. And in addition to that, what is natural to traffic, as to whether it will take that portion of the street where it can continue uninterruptedly, or as to whether it will take the portion

of the street where it will have to give way to some other vehicle which has the superior right?

A. Naturally would take the unobstructed route.

Q. So that taking such traffic as has been mentioned here, that travels up and down that street, the heavy traffic, consisting of the hauling of stone and brick from the quarries, and the hauling by farmers of wheat to the city, where would you say from your experience and knowledge would the traffic go on that street?

Objected to as already gone into.
Objection overruled.
Exception by plaintiff.

A. On the asphalt portion of the street.

Q. Now you didn't mean to be understood, Mr. Blodgett, that you thought it was impossible to keep macadam streets in repair?

A. I don't think I said impossible. I said impracticable.

Q. It's possible then?

A. Oh, yes.

Q. To keep macadam streets in repair?

A. All things are possible.

Q. Now why isn't it practicable?

A. On account of the large amount of work and the large cost. A macadam street, in order to be kept in good repair, must be taken care of immediately it commences to develop any rut or holes, and the longer you let those go the harder it is to bring it back into shape and the more it costs. It necessitates continual attendance on the work.

Q. It's a matter of cost?

175 A. It's a matter of work and cost, surely.

Q. And that's the sense in which you speak of it as being impracticable to keep it in repair?

A. Yes sir.

Redirect examination:

Q. Your assumption that most of the traffic under the conditions named would go upon the asphalt rather than the concrete was based upon the idea that the macadam was an inferior construction and not as well adapted for traffic?

A. It is not as well adapted for heavy traffic as the asphalt. Larger loads can be hauled on the asphalt with greater ease than it can be on the macadam.

Q. And that the traffic would be forced to the side because of the inferior condition of the railway right of way?

A. Yes sir.

Recross-examination:

Q. Well, it is also on the ground that there is more danger on the railway track?

A. That might have some influence on it undoubtedly, but the principal reason would be that there is the easiest place to haul.

Mr. Ryan: I desire to offer in evidence certain transcripts from the records of the register of deeds, certain conveyances here. I don't care to stop just now to do it, we can take the testimony and I will do that later.

The plaintiff thereupon rested its case.

Thereupon in defense the following testimony was produced by the defendant.

176 M. KREBES, being first duly sworn, testified in behalf of the defendant as follows:

(Examined by Mr. Schubring:)

Q. Mr. Krebes, where do you reside?
A. In Milwaukee.
Q. What is your occupation?
A. Superintendent of a construction company.
Q. What is the particular kind of construction that this company engaged in?
A. Street railway.
Q. How long have you been engaged in street railway construction?
A. Nearly fourteen years.
Q. Have you been engaged in street railway construction in Wisconsin?
A. Yes.
Q. In what cities of Wisconsin?
A. Fond du Lac, Oshkosh, Milwaukee, Neenah, Madison, Green Bay.
Q. Have you also been engaged in street railway construction outside of Wisconsin?
A. Yes.
Q. Now in the course of your work there as superintendent of that construction company, has it become necessary for you to become familiar with the kind of rails and equipment used by electric street railway companies?
A. Yes.
Q. In Wisconsin and elsewhere?
A. Yes.
Q. Have you also become familiar with the kind of equipment and construction used by horse street railway systems, horse car systems?

177 A. To a certain extent, yes. That is, I have torn up old horse car lines to rebuild them for electric purposes, and of course in a great many cases the old equipment we got it as junk and tore it apart, the old cars and stuff.

Q. So that you have become familiar with the kind of construction and the kind of equipment used on horse street railway systems?
A. Yes sir.
Q. As well as on electric street railway systems?
A. Yes.

Q. Now will you describe what the equipment of a horse street railway system consists of?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, for the reason that no horse street railways are actually now in use or have been for some years in this city.

Court: How is that material?

Mr. Shubring: It is material in this way, that some claim is made in the complaint concerning the franchise of 1884. It is material only if plaintiff is claiming that that franchise still has some effect, also on the probable meaning of the language in the ordinance of 1892. I might say that under the ordinance of 1884 the kind of a street railway provided for is a horse car.

Mr. Ryan: Is it your contention that under this ordinance we must be confined to the conditions that existed at the time it was granted?

Mr. Schubring: Not necessarily, but a change from a horse car system to an electric car system might justify certain differences and changes in the franchise under which the company was operating. It is offered for the purpose of showing and as explanatory of some changes existing between the franchise of 1884 and
178 that of 1892.

Court: I will adopt the same practice I have adopted in other cases. I will take the testimony and later determine the effect.

Exception by plaintiff.

Mr. Ryan: The further objection that any such evidence is incompetent to change the meaning of the written contract or ordinance.

Taken subject to the objection.

Exception by plaintiff.

Mr. Ryan: I make the further objection that this witness is not competent. The only experience he has had with horse car systems is tearing them up and treating them as old junk.

Objection sustained.

Exception by defendant.

Q. Where has it been necessary for you to work on installing an electric street railway system and taking out a horse car system?

A. Oh, several places. Kansas City for one, Austin, Texas, and some in Milwaukee.

Q. Have you had occasion in connection with your business to become familiar in other ways, by study or otherwise, of the equipment which horse street railways use, the nature of the equipment?

A. Yes sir.

Q. And the nature of the construction of horse railway systems?

A. Yes sir.

Q. Now I ask you, Mr. Krebes, to describe in a general way what equipment is used, the nature of the equipment—not in detail, but as a general proposition, the equipment that is used in horse street railway systems?

Mr. Ryan: I renew my objection that the witness is not qualified

as to the equipment, by merely installing electric railways and tearing up old horse car systems, especially when there is
179 nothing given as to the character of the railway and the similarity between the Kansas City railway and one in this state.

Mr. Schubring: There is no purpose of going into the detail of the equipment, but there are certain portions of the equipment in an electric car that the horse car does not possess, and all I intend to show here is the difference in the kind of equipment.

Court: As I understand the witness' testimony, his only information is by going in and tearing up a system and installing an electric system.

Q. Well, in the cases in which you had experience in taking up the horse car systems, what did the equipment of such a system consist of?

A. We are in the contracting business, and as contractors the different corporations furnish a general outline of the work to be done, and in some cases that describes the—well, there may be water mains that may be in the way, there may be an old horse car track in the way, to be removed——

Mr. Ryan: I move to strike out the answer as not responsive.
Motion granted.
Exception by defendant.
Mr. Schubring: I withdraw that question.

Q. If there is any other source of knowledge, Mr. Krebes, that you have from which you have gained familiarity with the equipment of horse street railway systems, kindly explain.

A. The horse car tracks that I have torn up have been built with very light rails, from thirty to forty.

Mr. Ryan: I move to strike out the answer as not responsive.
Motion granted.
Exception by defendant.

180 Q. The question now is, Mr. Krebes, what other sources of information, if any, you have with reference to these lines, except what you have already given us; it isn't what the lines consist of, but your sources of information.

A. Why, I have made a study of the street railway business. We have had to do that from its beginning.

Q. Now in connection with your contracts for the construction of electric systems, which involved a replacement of a horse car system, was any information furnished you which you examined concerning the equipment of a horse street railway system?

A. Yes.

Q. What was that?

A. It was specifications of the old existing horse car system, plans and specifications.

Q. And those were studied by you?

A. Yes.

Q. And you became familiar with them?

A. Yes.

Q. Now will you describe in a general way what the equipment of a horse street car system consists of?

Mr. Ryan: I renew my objection, for the reason that plans and specifications are not the system, and that he is not qualified to testify.

Court: He may answer, confining himself to matters which he knows of his own knowledge.

Exception by plaintiff.

A. Well, the horse car tracks, the tracks that we tore up was built out of light rails, 4 x 6's used as cross ties, spaced about 2½ to 4 feet apart, and very small spikes, 2½ to 3-inch spikes, and light angle-bar joints.

181 Mr. Ryan: I want to make the further objection that the conditions under which the defendant or its immediate predecessor operated in the city of Madison are contained in the franchise, and the franchise itself is the best evidence. I think it specifies the size of the rails and speaks of the ties and things of that character.

Court: The testimony may stand and I will later consider what effect it has.

Exception by plaintiff.

Q. What about the kind of cars used?

Mr. Ryan: I renew my objection to that for the reason that the tearing up of the tracks doesn't give any information as to the kind of cars used.

Court: What do you know about the cars used?

A. I have bought a good many old cars myself, personally.

Objection overruled.

Exception by plaintiff.

A. They were very small. No electrical equipment in them of course. Pulled by horses or mules. They would seat from twelve to eighteen people I should say. There are different sizes of horse cars the same as there are of electric cars. They were not all the same size, some of them a little larger than others.

Q. How did the cars generally compare as to size with those used on an electric street car system?

Mr. Ryan: I renew my objection, because the witness hasn't sufficient information to make a comparison, hasn't testified that he ever has seen a horse street car system in operation.

Objection overruled.

Exception by plaintiff.

A. Well, the horse cars would seat, as I stated, about twelve to eighteen people, and the electric cars in use now seat from
182 forty—well, I guess there are some smaller than that—I would say from thirty-six to seventy.

Mr. Ryan: I renew my objection, and move that the testimony be stricken out as not responsive.

Motion denied.
Exception by plaintiff.

Q. Now how does the construction of street railway cars as you observed it, taking the track now, compare with the construction of the track and cost of an electric street railway system, as to whether it is more or less expensive?

Mr. Ryan: I object to that, the witness hasn't shown that he has any knowledge of the expense of installing and keeping a horse system.

Objection overruled.
Exception by plaintiff.

A. The horse car tracks cost from four to six thousand dollars a mile to build. Electric track costs from twenty to forty thousand dollars a mile.

Mr. Ryan: I want to make the further objection that it is irrelevant, incompetent and immaterial, and move that it be stricken out.

Court: It may stand subject to the objection.
Exception by plaintiff.

Q. What about the comparison of the rails, as to whether the rails of an electric street railway system are heavier or lighter than those of a horse car system?

A. The rails of the electric system are much heavier than those of a horse car system.

Q. What about the overhead system, the trolley system of an electric railway?

A. They have to have an overhead system for electric cars.

Q. Is there anything corresponding to that in the horse street car system?

183 A. No, there is nothing.

Q. What do you say, Mr. Krebes, from your knowledge of the horse street cars which were replaced by electric street cars, and your knowledge of the plans and specifications and equipment of such cars, such systems, and of electric street railway systems, as to a difference in the cost of construction between the two?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial and calling for testimony based upon hearsay and irrelevant matter.

Objection overruled.
Exception by plaintiff.

A. The electric system costs from five to seven times greater than the horse car. There are exceptions to that though in large cities. We have built track where we get ten and fifteen times the price for electric that we would get for horse cars.

Mr. Ryan: I move to strike out the answer as not responsive, not setting forth the conditions under which they were installed, raising issues not involved in this case.
Motion denied.
Exception by plaintiff.

Q. In your construction of electric street railway systems in this state and other states, have you had experience with the laying of street railways on streets on which asphalt pavement was placed or had been placed?

A. Yes.

Q. Have you had considerable experience of that kind?

A. Yes.

Q. And you have constructed, have you, lines of street railway on streets on which there was an asphalt pavement?

A. Yes.

Q. And you are familiar with the general nature of an asphalt pavement?

A. Yes.

184 Q. And the manner in which it is put in?

A. Yes.

Q. You have had occasion to observe that, have you?

A. Yes.

Q. I don't know whether you have ever put down pavements yourself or not?

A. I have never put them down, but we have had them put down for us.

Q. In connection with your construction?

A. Yes.

Q. So that you have had occasion to see the manner in which asphalt pavements were laid?

A. Yes.

Q. Now, Mr. Krebes, what do you say of the practicability of putting a line of headers on the outside of the railway zone and paving up to that header or the railway zone with asphalt and permitting the railway zone to be kept in macadam, as to whether that can be done so that vehicles can travel readily and easily from one side of the street to the other across the street railway zone?

Mr. Ryan: I object to the question, because the witness has not shown himself qualified to answer. He hasn't testified that he ever laid a pavement or had anything to do with it.

Objection overruled.

Exception by plaintiff.

A. It would be practicable. There is absolutely no question about it.

Court: I am not certain that I understood the question. Are you talking about the construction side, or simply the finished result?

Mr. Schubering: The finished result.

Court: That is as I understood it.

185 Q. Now having your asphalt constructed on both sides up to the railway zone, with the headers, in the manner that has been described here in the testimony, what do you say as to future repairing or improvement of the railway strip in between these lines of headers, as to whether it is practicable to make such improvements

in the macadam or some other pavement in between without disturbing or interfering with the asphalt on either side of the railroad right of way?

Mr. Ryan: Objected to as irrelevant, and that the witness has not shown himself qualified to answer, his testimony being that his work is entirely concerned with the construction of the railway, and this calls for evidence of construction of the street separate and distinct from the railway.

Objection sustained.

Exception by defendant.

Q. Have you had occasion at various times to have charge and actually to construct under your supervision the pavement of the railway zone, street railway tracks?

A. On a great many hundreds of miles of them.

Q. That has been necessary and is necessary very frequently and almost always in connection with your work?

A. Yes.

Q. Are you familiar with any construction anywhere where the railway zone is a form of macadam improvement and the remainder of the street asphalt?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial. The question is whether it is good construction, not whether it exists.

Objection overruled.

Exception by plaintiff.

A. Yes.

Q. Where are the instances that you have in mind?

186 A. In Milwaukee.

Q. Where in Milwaukee?

A. On Vliet street from Twentieth to Twenty-seventh.

Q. Anywheres else?

A. On North avenue from Fond du Lac avenue to Teutonia avenue. On National avenue from Thirtieth to Thirty-third. And there are a great many other stretches that I can't call to mind there.

Mr. Ryan: I move that the last part of the answer be stricken out as a conclusion.

Court: Are you speaking from personal knowledge?

A. I just can't remember the names of the streets. I know where they are; if I had a map I could tell you.

Q. You are familiar then, are you, with the construction on Vliet street within the distances you have mentioned?

A. Yes.

Q. Did you have anything to do with that construction?

A. I had charge of the construction.

Q. That is, you had charge of the street railway construction?

A. Yes.

Q. Did you put in the street improvement within the street railway strip?

A. Yes.

Q. Now what is the nature of the construction there on Vliet street?

A. That street is an asphalt pavement on the sides of the street up to the existing railway zone. *T*t was an old track of girder rail in most instances, which was nearly worn out and in very bad condition. We tore out the old track and built new track, putting about eight inches of crushed stone underneath the ties and filling in between the ties and up to within about two inches and a half from the top of the rail with crushed stone. The remaining
187 two inches and a half was a mixture of oil and crushed stone, which is known as penetration macadam or filled macadam, whichever you prefer to call it.

Q. Is that oil what you call asphalt cement?

A. No, that is standard oil.

Q. Which is mixed with the crushed rock and placed on top and rolled?

A. Yes.

Q. Now what was the nature of the construction there between the asphalt and this macadam.

Mr. Ryan: I want to make the objection for the purposes of the record to this testimony on the ground that it is irrelevant, incompetent and immaterial, and for the reason that when the board of public works determines to improve a street their determination cannot be attacked except on the ground that it is fraudulent, arbitrary or oppressive.

Objection overruled.

Exception by plaintiff.

A. The macadam was joined right to the asphalt.

Q. Are you familiar with the way in which the asphalt was held in place when it was put in?

A. Yes.

Q. What was that method?

A. There was a stringer, 2 x 8 or 2 x 10, placed along there, and stakes driven down and the stringer nailed to the stakes.

Q. And the asphalt then placed up against the stringer?

A. The asphalt then placed up against the stringer.

Q. What did you do then when you came along to put in the macad- improvement on the railway strip?

A. We tore out this board.

Q. You took out this board?

A. Yes.

188 Q. And your macadam then rests directly against the asphalt?

A. Directly against the asphalt.

Q. What effect, if any, did the improvement that you made on the railway right of way and the macadam you put in have on the

asphalt that was already in, as to whether or not it injured that asphalt?

A. It didn't injure it any.

Q. Did it injure the concrete under the asphalt any?

A. No.

Q. Now did the improvement on North avenue and on National avenue that you have referred to differ any from that which you have described on Vliet street?

A. The same.

Q. It was the same construction?

A. The same construction.

Q. So that your explanation of the construction of Vliet street also describes the construction on these other two streets?

A. Yes.

Q. If the asphalt pavement had been put in on University avenue up to the railway zone with a line of headers as has been described here, what do you say as to whether or not it was practicable thereafter to improve either the street railway strip or macadam or other improvement on the street railway strip without in any way interfering with the asphalt pavement on either side of the railway zone?

A. If the header would have been set outside of the outside ends of the ties it wouldn't make any difference whatever in the reconstruction of the track.

Q. You could reconstruct the track or repair it without interfering with the asphalt pavement?

189 A. Certainly, providing the heading was outside of the end of the ties.

Q. And you could alter or repair the improvement, whether it was macadam or other improvement, within the railway zone, without in any way interfering or endangering the asphalt pavement on either side of the railway zone?

Objected to as leading and suggestive.

Objection sustained.

Exception by defendant.

Q. What effect, if any, would the repairing or replacing of any pavement within or improvement within the railway strip have on the asphalt part of the street on either side of the railway zone?

A. None whatever, if this header was set back of the end of the ties.

Q. That is, if it was properly constructed?

A. Yes.

Q. What do you say as to the ease with which vehicles could cross this railway zone if the street on both sides of the railway zone were paved with asphalt and the railway zone was improved with macadam and kept in repair, as to whether or not vehicles could then cross the railway zone easily or whether it would be difficult for them to cross?

A. They could cross it very easily; as easily as they could with

any other ordinary pavement in there. They have been crossing for the past twenty years under these same conditions.

Mr. Ryan: I move to strike out the latter part of the answer as not responsive.

Motion granted.

Exception by defendant.

Cross-examination by Mr. Ryan:

Q. That assumes, Mr. Krebes, that you have the macadam kept up flush with the top of the rails?

190 A. Not necessarily flush; within a half inch.

Q. It would interfere seriously with the crossing of vehicles if the macadam was worn away two or three or four inches, would it not?

A. It would interfere with them.

Q. In the course of your work with street railway construction you have been employed or your company has been employed by the defendant company in this case, has it not?

A. Yes, we have had contracts with the Traction Company here.

Q. And you have practically done all the work they have had done in that line in this city for some time in the past, have you not?

A. No, I couldn't say that we have done practically all of it. We have done practically all that they have contratced, but they have done a lot of work themselves. I couldn't say that we have done all that they have contracted; that is my impression that we have.

Q. What work have you done?

A. We have done State street and a little piece on Park street and the work around the capitol, I think seven or eight years ago, and King street, and extended the switch out on Jenifer street, and rebuilt—oh, I should say twelve, fourteen hundred feet on Johnson street.

Q. Did you do any other work on Jenifer except the switch?

A. Yes, we extended the switch on Jenifer and Baldwin, I think that is, and put in double curves around onto Williamson street, and also moved the double track up four or five hundred feet on Williamson street.

Q. Your company is now negotiating with the defendant company for work in the city?

A. Yes.

Q. Have you ever had any experience in purchasing any

191 material for equipping a horse street railway system?

A. In purchasing the equipment.

Q. In purchasing any material for the purpose of running?

A. No; they have gone out of existence so long.

Q. Whatever material you have purchased was some worn out material that was being discarded?

A. I think we purchased some——

Q. No, just answer the question.

Mr. Ryan: I move to strike out the answer.

Motion granted.

Exception by defendant.

Q. Answer by yes or no. (Question read.)
A. No.
Q. Did you ever buy a street car for use on a horse street car system, tentative use?
A. No.
Q. Did you ever buy any ties or rails for use upon a horse street car system?
A. No.
Q. Did you ever buy any material whatever for use upon a horse street car system?
A. No.
Q. So then whatever you have purchased in the way of material or equipment was material that had been used or equipment that had been used in the system, was it not?
A. I would hardly answer it that way. I would like to explain it.
Q. No, I think that is a very easy question to answer.
A. No, it isn't for me. If you understood the conditions you would say it wouldn't be.

(Question read.)
Court: I take it you are referring to horse car systems entirely?
191½ Mr. Ryan: Horse car systems.

Q. Do you get the question now?
A. Yes, I get the question, but there is a little case in mind where we got some stuff that hadn't been used, and I can't answer the question fairly.
Q. You can answer it fairly by yes or no.
A. I would have to say no to it.
Q. Then what material have you ever purchased for use upon a horse street car system in the way of equipment?
A. None; absolutely none.
Q. Now when you made your comparison between the size of cars used upon a horse street car system and electric system, you had in mind an electric system such as used in the city of Milwaukee or Chicago, had you?
A. When I referred to the small cars, I was referring to a place like Madison here when I said 36 to 37.

Mr. Ryan: I move to strike out the answer as not responsive.
Motion denied.
Exception by plaintiff.

Q. Do you know of any car used in the city of Madison with a seating capacity of 70?
A. No.
Q. And you were not referring to the city of Madison when you referred to an electric car with a seating capacity of 70?
A. Yes.
Q. When you made a comparison of the electric system of cars having a seating capacity of seventy, you had in mind such as used in Milwaukee and Chicago?
A. Yes.

Q. And not in Madison?

192 A. In large cities. I would include also small cities with interurbans.

Q. Large cities and small cities with interurbans?

A. Small cities with interurbans have cars with a large seating capacity.

Q. And when you testified that the cost of an electric system was in the neighborhood of five to seven times that of a horse car system, you had no information whatever as to the cost of equipment for a horse car system for use in the system, had you?

A. Yes, I had.

Q. You had no personal experience however?

A. I have personal information, buying that stuff, you know.

Q. I mean of buying equipment and material for use in a horse car system.

A. Yes. I haven't purchased any material for use in a horse car system, but I have the knowledge of being able to purchase that material.

Q. I ask you now if you had any personal experience of purchasing material for use in a horse car system?

Objected to as having been asked and answered.

Objection sustained.

Exception by plaintiff.

Q. Did you ever contract to build any horse car system?

A. No.

Q. Have you had any experience in the construction of a horse car system, other than to tear it out?

A. No.

Q. Did you have some knowledge as to the cost of an equipment of a horse car system that came to you from what someone told you?

A. No, I have that knowledge from study and the purchasing of materials.

193 Q. I am speaking of horse car systems now?

A. Yes, I understand.

Q. You say you have never purchased any material for use in a horse car system?

A. No, I never did.

Q. So then the only source of information would be your study?

A. And the general purchasing of materials.

Q. Of which——

A. Which we had in our business.

Q. So you never purchased any in a horse car system?

A. We purchased some materials for an electric system that we would purchase for a horse car system; in fact we purchased everything and a great deal more of it and heavier and the same description.

Q. You never built a horse car system, you never had anything to do with the construction of a horse car system, you never ran a horse car system; consequently you are not qualified to testify as to the cost of a horse car system?

A. Yes, I am. I would contract to build one for you. There is nothing more to a horse car system than there is to a railroad track out here, you know.

Mr. Ryan: I move to strike out the answer as not responsive.
Court: From "there is nothing more" may be stricken out.
Exception by defendant.

Q. What horse car system had you in mind and what electric system had you in mind when you said the one cost probably five times as much as the other?
A. When I said from five to seven times, I was referring to small properties like this property here in Madison, Green Bay, and that track cost from five to seven times more, and the over-
194 head, against the ordinary horse car tracks that were used over the country twenty-five years ago.
Q. You make comparison of Madison as an electric system and the Green Bay electric system, as compared with any horse car system?
A. The horse car systems are nearly alike you know.
Q. I want to know what city you were comparing it with?
A. Well, you take the electric system of towns of twenty-five, forty, fifty thousand.

Mr. Ryan: I move to strike out the answer as not responsive.
Motion granted.
Exception by defendant.

Q. You said you made a comparison of the cost of Madison and Green Bay as compared with some horse car systems. Where is that horse car system?
A. Oh, Milwaukee and Kansas City.
Q. Did you have any information as to the cost of the system in Milwaukee?
A. Only my personal information, what I know from tearing up the track.
Q. Did you have any other information as to the cost of the system in Kansas City, other than you got from tearing up the track?
A. And my personal knowledge of track construction.
Q. That's all electric track construction.
A. Or steam road; any other track. That is our business.
Q. Any other track except a horse car track, which you never built—that is a fact, is it?

Mr. Jones: I object. He has answered this many times.
Objection overruled.
Exception by defendant.

A. I have never built a horse car track.
Q. So then the only knowledge you had of the value of
195 the Kansas City system is what you got from tearing up the track?
A. And my personal knowledge.

Q. That personal knowledge, what was that?

A. About fourteen years of experience in building tracks of different descriptions.

Q. You got your knowledge as to the value of horse car tracks from building electric tracks, didn't you?

A. Yes, partially; the greater part of it.

Q. Entirely?

A. Not entirely. I observed the tearing up of these tracks and know the construction of them.

Q. I concede that you got your knowledge from tearing up and by observation then made.

A. And also knowing what horse car systems cost.

Q. How did you know it?

A. We are a company, a holding company, we own several systems, and we know what these things cost.

Q. Did you ever see a horse car system in operation?

A. Yes sir, up until a few years ago there was one in operation in Chicago.

Q. Now of course the cost of any street car system, any electric street car system, would depend very much upon the conditions under which it was built?

A. You are right.

Q. And very much upon the local conditions you had to contend with: grades and cuts and fills?

A. Yes sir.

Q. And you can't make any comparison that would be worth while between the two electric systems unless you gave the conditions concerning the construction of each, that would be of any value, can you?

196 A. Oh, yes. The properties I have referred to are similar properties. I am taking the towns of twenty-five to fifty thousand.

Q. Well, if you had to build a viaduct or overhead bridge and had to make some heavy grades and cuts and fills in one, and the other city you had a level track——

A. I tried to explain that to you in the latter part of one of my answers, that there would be exceptions where they would cost fifteen times as much and that could be exceeded by unforeseen obstructions.

Q. So that there wouldn't be very much value to your comparison of construction of street car systems in Kansas City and Madison?

A. Oh, yes.

Q. Unless you state just the conditions?

A. We have done similar work in Kansas City that we have done in Madison.

Q. But if you built a horse car system on a level street in Kansas City, you could build it a great deal cheaper than you could build a street car system on some of the grades and hills in Madison, couldn't you?

A. Do you know Kansas City?

Q. Just answer that question.
A. That is very similar. The grades and hills in Madison are the same as in Kansas City.

Mr. Ryan: I move to strike out the answer as not responsive.
Motion granted.
Exception by defendant.

A. There are no level streets in Kansas City, so I can't answer that question.

Mr. Ryan: I move to strike out the answer as not responsive.
197 Motion granted.
Exception by defendant.

Court: You are to assume that the streets are level, and then answer the question.
A. I am to assume that the streets in Kansas City are level?
Court: Yes.
A. That is pretty hard to assume.
(Question read.)
A. Oh, that question, I can't answer it. The grades and hills have nothing to do with the cost of a piece of work, whether it is up hill or down hill or anything else.
Q. Well, answer the question.
A. How can I answer the question?
Q. You can't answer it then?
A. I can't see any way to answer the question.
Q. The reason you can't answer it is that you haven't any knowledge as to the cost of horse street car construction, is that the reason?
A. That is not the reason.
Q. Have you ever had any experience as a contractor in laying asphalt?
A. Yes.
Q. I mean personally as a contractor, in which you were the contractor personally?
A. Personally, yes.
Q. Where was that?
A. We take contracts and then sublet them to the asphalt companies.
Q. Who do you mean by we?
A. Our company.
Q. I asked a very simple question. I asked you if you
198 personally ever had, individually, any experience as a contractor in laying asphalt on streets?
A. Yes. I am a contractor, yes, I can answer yes to that.
Q. Where was one of those cases?
A. In Kansas City.
Q. You had a contract for laying asphalt, did you?
A. We sublet the contract. That is what I wanted to tell you.
Court: Just pay attention to that question. The question was whether you had had the contract to lay the paving yourself?

A. Personally, no.

Q. Now you work for a company who takes contracts?

A. Yes, I work for a company. I am not a contractor. I am working for a corporation which is a contractor.

Q. Personally you never were in the contracting business yourself?

A. No.

Q. In what capacity have you been employed by the company in doing asphalt work?

A. As general superintendent. Not as doing asphalt. I am general superintendent, doing all work.

Q. We will just consider asphalt work for a while. What is the name of the company you work for?

A. Columbia Construction Company.

Q. Does the Columbia Construction Company take contracts or do the work of laying asphalt upon streets?

A. We take the contracts, but do not do the work.

Q. Take the contracts for laying asphalt?

A. Take the contracts for laying asphalt.

Q. But you do not do the work?

A. We sublet the work.

Q. So that as an employe of the Columbia Construction
199 Company you have had no experience in laying asphalt upon streets?

A. Oh, yes, we have too.

Q. You sublet the contracts?

A. We sublet the contracts. The corporation that we take the contract from holds us responsible, and we have full supervision of the work, and then we take and sublet the different portions of it that we don't want.

Mr. Ryan: I move to strike out the last part of the answer as not responsive.

Motion granted.

Exception by defendant.

Q. I am getting at what experience you personally have had in this work of laying asphalt upon streets.

A. I will be perfectly willing to tell you if you will just let me. Merely observing it very closely and seeing that the asphalt companies satisfy the street railway companies that we work for.

Q. In other words, the work that you were supervising was contract work for construction of electric street railway companies?

A. Yes sir.

Q. Now then you were not interested in carrying out the conditions of any contract with any city for the laying of asphalt on a street, were you?

Mr. Jones: Do you mean he didn't make contracts with the city?

Mr. Ryan: I asked him if he ever supervised the construction of any contract with the city for the laying of asphalt upon a street?

A. You mean did I ever work for the city, to supervise for the city?

Q. No. Your company, as I understand it, sublets all their street contracts?

200 A. Not all of it. Just the asphalt. The brick paving and the stone we do ourselves.

Q. The work that you do for your company, which you are paid for, consists in supervising the construction of the track and of the electric railway, does it not?

A. Yes sir.

Q. But you do not supervise the work under any contract for the laying of asphalt?

A. Yes sir.

Q. In what way is that, Mr. Krebes?

A. We maintain that right of supervision.

Q. Have you personally supervised the work done under any contract for the laying of asphalt upon a street?

A. Yes sir, I have put my inspectors in.

Q. You put your inspectors there?

A. And myself together, yes.

Q. And how much time did you devote to that?

A. I would be walking along the street. I would probably stop and look at it five or ten minutes, maybe four or five times a day. That is as near as I can come to it.

Q. That is all you ever had to do with it?

A. That's all.

Q. You had an inspector to see that the work was done according to contract?

A. Had an inspector there.

Q. And he was charged with that duty and not you?

A. Oh, no, I was charged with the duty.

Q. But he did the work?

A. He did a portion of it.

Q. Mr. Krebes, what do you understand by "macadam pavement?"

A. Crushed stone laid in a layer and rolled.

201 Q. That is, ordinary limestone that is laid down, rather loose stone, and crushed into shape and some dirt and fine stone above it?

A. Not necessarily dirt.

Q. Well, what?

A. You can put in different kinds of macadam pavement. You can put in water-bound or oil or asphaltum. There are a great many different kinds of macadam pavement.

Q. What kind of macadam pavement did you refer to when you said that Vliet street between Twentieth and Twenty-seventh streets in Milwaukee was macadamized in the railway zone?

A. It's an oil-bound.

Q. And that consists of what?

A. That consists of crushed stone foundation, being rolled solid, and then a mixture of oil and crushed stone top, put on two to two and a half inches deep, and then rolled.

Q. A mixture of oil and crushed stone?

A. Yes.

Q. Did you see that put in?
A. Yes.
Q. How is that oil and crushed stone mixed?
A. They were mixed in a mixer.
Q. Mixed in a machine?
A. Yes.
Q. And what was done to it by the machine?
A. It was mixed in the machine.
Q. Cold?
A. Hot.
Q. It was heated, was it?
A. Yes.
Q. And put onto this street in a heated condition?
202 A. Yes.
Q. And 'tis a form of asphalt pavement, is it not?
A. It is not.
Q. It is quite different, isn't it, from the macadam that consists merely of crushed stone and finer stone and dirt above?
A. It doesn't make much difference whether you hot mix it or whether you heat the oil and put it on top. Just a difference in the mode of construction. Some do it one way and some the other.
Q. The macadam pavement which was placed on Vliet street in Milwaukee between Twentieth and Twenty-seventh streets is quite a different mixture and material from a macadam pavement such as we have on University avenue, which consist- of crush- rock and some finer rock and dirt above it?
A. There is some difference; in the top two inches, that's all. The rest of it is the same.
Q. That is generally referred to as an asphalt concrete, isn't it?
A. No. There is no asphaltum about that at all. This is oil——
Q. Wait a minute. I ask you if that is what you referred to as asphalt concrete?
A. It isn't.
Q. Did you ever hear of that kind of a pavement referred to as an asphalt concrete?
A. Not that kind, no.
Q. That is held in place by an asphaltic binder, isn't it?
A. No.
Q. And is mixed in practically the same way that you prepare or mix asphalt for spreading upon the street in a machine, mixing it and heating it?
A. It is mixed in a machine.
203 Q. And that is the way you mix asphalt, in a machine, do you not?
A. Yes, but you add different ingredients. The two operations are similar.
Q. This asphaltic concrete, or whatever term you call it, that was placed on Vliet street in Milwaukee was placed on hot, the same as you place on sheet asphalt hot, is it not?
A. This oil—I object to the word asphaltum—it is placed on the street hot and rolled.

Q. It is really a form of cheap asphalt, is it not, asphalt pavement?

A. No.

Q. Do you want to be understood as saying that there is no asphalt placed in that kind of a macadam?

A. There is no asphalt. It is oil, Standard oil. We bought it as such anyway.

Q. What do you mean by Standard oil?

A. We bought it of the Standard Oil Company.

Q. What per cent. of asphaltum is contained in that Standard oil you speak of?

A. We paid them four and a half cents a gallon for it.

Mr. Ryan: I move to strike out the answer as not responsive.
Motion granted.
Exception by defendant.

A. That is one of those questions. If he will let me explain it——

Court: Answer the question directly. How much percentage of asphalt is contained in the oil?

A. I don't know whether there is any or not.

Q. Now is that the same kind of a pavement that was placed on North avenue between Fond du Lac and Teutonia avenue?

204 A. It is the same as placed on North avenue. There is a little difference.

Q. What kind of paving was placed on that?

A. That was the same as Vliet street.

Q. What kind of a pavement was placed on National avenue in the railway zone between Thirtieth and Thirty-third streets?

A. Very similar.

Q. It contained this oil you speak of?

A. Yes.

Q. But you do not know the constituents of that oil?

A. No, I don't.

Q. Now the macadam you refer to in the railway zone on Vliet street in Milwaukee, on North avenue and National avenue, were placed there under a stipulation between the city of Milwaukee and the railway company because of litigation pending in the courts relative to the street railway system?

Objected to as immaterial.
Objection overruled.
Exception by defendant.

A. Yes sir.

Q. And you understood that that was placed in there as a temporary proposition, to tide over the time until the litigation could be determined?

Same objection.
Objection overruled.
Exception by defendant.

A. It was placed in there for a three year period.

Q. And was not considered a permanent improvement, was it?
A. Permanent for three years.
Q. And what happened to it on the fourth year?
A. That remains to be seen.
Q. Who put that asphalt in the railway zone, was it the Columbia Construction Company?
205 A. The company.
Q. The Columbia Construction Company?
A. No, the street railway company put it in. We put in the foundation up to within two inches of the top of the rail, as I stated.
Q. Now when the street railway company placed in the asphalt in the railway zone on Vliet street, did you observe the work being done?
A. Yes.
Q. And did you know that in doing that work the railway company cut off about a foot of the asphalt all along that portion of Vliet street?
A. No, we didn't cut off a foot of asphalt. We done that work.
Q. Now let us understand that, Mr. Krebes. I want to know whether the Columbia Construction Company or the street railway company placed the asphalt in the railway zone on Vliet street between those two streets you mention?
A. We placed the foundation for this hot stuff on top, which we had to put the width of the street in condition to receive the top stuff, and in places we cut off a foot and a half of asphalt for eight or ten feet, and in a great many places we didn't cut off any. The old tracks run crooked, like this (illustrating), they were crooked, they weren't in the center of the street, and we run with the new tracks a straight line there. Some places there would be a hundred feet where the old track would go to one side of the street and crowd over on the new pavement, and we would cut that off to maintain the line of the new track.
Q. You remember in answer to a question by counsel that you testified that that work of putting in that macadam as you call it in the railway zone on Vliet street between Twentieth and
206 Twenty-seventh was done without disturbing the asphalt?
A. That was a big percentage of it. This was merely an alignment of the track. The great per cent. of it never was disturbed.
Q. Do you recall here a short time ago, in answer to a question by counsel, that you testified that in placing the macadam on Vliet street in the railway zone between Twentieth and Twenty-seventh street, that that was done without disturbing the asphalt on the sides of the street?

Mr. Jones: I don't think that question was asked him, and I don't remember that he made that statement. His statement was that they put the asphalt close up, but he didn't state that they did not disturb the asphalt in any way.
Objection overruled.
Exception by defendant.

A. I don't just exactly recall that.

Q. When this asphalt was cut off about a foot or foot and a half in places, as you testified, could the work then be done of completing the railway zone and leaving the street construction in good workmanlike manner?

A. Yes sir. It made no difference. Do you want me to explain that?

Q. No. I want to know what you consider a good workmanlike manner. If you went out a foot and a half on the other side and fixed it up in the same way, you would still consider that work done in a good workmanlike manner, would you?

A. Yes sir.

Q. What kind of a machine was this material mixed in that was used in mixing this macadam as you call it?

A. It was a hot mixer of some description. I never saw the machine. They had it placed several blocks from the work. I never saw this machine. I have seen lots of machines, but I never saw this machine.

207 Q. You didn't see this material mixed?

A. I didn't see this material mixed.

Q. You don't know what the constituents of the material are?

A. Yes, I saw the material on the streets you know.

Q. You saw it after it was mixed?

A. I have seen a lot of the material before it was mixed, before it was hauled to the plant.

Q. I am asking you about the particular material that went into the railway zone on Vliet street.

A. Yes, I understand you.

Q. You didn't see it while it was being mixed?

A. I didn't see it while it was being mixed.

Q. You didn't see it while it was being hauled from the mixer to the street?

A. Well, I have seen the wagons coming with this stuff in from the mixer. I couldn't see them at all times. They would be out of sight part of the time.

Q. Did you know what ingredients composed the mixture that was placed on that strip?

A. I knew the general ingredients, yes. I know that they used the crushed stone and the oil.

Q. You knew by simple observation as it was placed on the ground?

A. By observation as it was placed on the ground, and also observation of the materials. I seen a lot of the material that was hauled in for the work. You see they received this material in one place and the plant is set up in another. I could easily see the material, and not see it mixed. The stone would come on the street railway cars and would be dumped in a pile, we received a lot of the same kind of stone, and this oil was laying around over the city in piles, and you could see the oil any time you wanted to.

208 Q. You knew there was some oil spread around different places in Milwaukee, and you knew there was a certain

amount of street material hauled to different places in Milwaukee, and you knew there was a street mixer somewhere in Milwaukee, but you didn't know whether any of this particular material was later used upon this street, did you?

A. I have a way of knowing, yes.

Q. You saw some material brought out and dumped on the street, didn't you?

A. Yes.

Q. You saw some crushed stone in it, didn't you?

A. Yes.

Q. And you saw there was some dark black material which you call oil mixed with it, didn't you?

A. Yes sir.

Q. Do you know what percentage of mixture of crushed stone or oil was in that particular material?

A. I don't remember. Yes, I knew about too. If you want to know I can tell from looking, from my personal knowledge, I know about what it was.

Mr. Ryan: I move to strike out the answer.

Motion granted.

Exception by defendant.

Q. First I want to know whether you know or not. Do you know what percentage of different materials of that mixture went on that macadam on Vliet street. I asked if you knew what the percentages of the different materials were that went into the mixture?

A. Not the exact percentages, but very close.

Q. What means of information did you have?

A. Oh, from observation, seeing the material delivered on the street.

209 Q. That is, you could tell whether it was a 1-2-4 mixture, or 1-3-5 mixture, by looking at it from the street?

A. From similar work you can tell about how much oil has been added, whether it is two or three gallon- per yard of the material.

Q. That was your means of information?

A. Yes, that was my means of information.

Q. Now then you don't know whether there was any asphalt in the oil or not?

Objected to as already answered.

Objection sustained.

Exception by plaintiff.

Q. And your only source of information was from observation of the material after it was mixed and placed upon the street?

Court: I think that has been gone over very thoroughly.

Q. Do you know whether in connection with doing that work you or someone for the contractor purchased asphaltic binding from the city of Milwaukee and used it upon that particular work?

A. No, I don't. We didn't purchase any.

Q. You didn't know of any being purchased?

A. I do know of some being purchased, but we didn't purchase it. I just merely know it from hearsay.

Q. Do you know whether some asphaltic binder was used on that particular work?

A. I can't say that I know.

Redirect examination by Mr. Schubring:

Q. The base on which the ties on Vliet street and these other streets rested was crushed rock?

A. Crushed stone.

Q. And there was crushed rock up to within two inches of the top?

A. Two to two and a half inches.

Q. And this mixture on the top was a rock mixture with
210 oil that was put on the top?

A. Yes sir.

Q. You spoke of it as Standard oil. Have you any information as to what kind of oil was used?

Mr. Ryan: I object for the reason that he has said two or three times that he didn't.

Court: It has been pretty thoroughly covered. If there is anything additional he may answer.

Q. Have you anything else you want to say in connection with that oil, Mr. Krebes, as to the kind of oil that was used there?

Mr. Ryan: I withdraw any objection I made, if he wants to talk about the oil.

A. It was a Standard oil. It was a cheap grade of oil.

Q. Now you were asked concerning the length of time that this pavement was to remain, and you said for three years. Under what conditions was it to remain definitely for three years?

A. The city and the street railway company entered into an agreement, but I am not familiar with it. I have read it over once, and I haven't looked at it since.

Q. Do you know what was to happen to this pavement after the expiration of three years, assuming that the street railway company prevailed in its litigation?

A. That is covered in that stipulation, but I will tell you, Mr. Schubring, I am not familiar enough with it to know. It has been so long since I have looked at it. I can tell you my understanding of it.

Q. Well, what is your understanding? You said something about understanding that it should be there for three years. Now what is your understanding of it?

Objected to as irrelevant, incompetent and immaterial.
211 Objection sustained.
Exception by defendant.

Q. Do you see any objection to placing the same kind of mixture that is placed for the top two and a half inches on Vliet street and on these other streets in Milwaukee, along the whole of the railway strip on University avenue?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, for the reason that he doesn't know what the mixture was on Vliet street, and for the further reason that what mixture shall be placed on University avenue is properly determinable by the city authorities.

Objection overruled.

Exception by plaintiff.

(Question read.)

Q. Could this be done easily?

A. It could be done, yes.

By the Court:

Q. I don't know as I understand your testimony correctly, but if I do understand it, it is that you have not seen this macadam mixture used anywhere but in Milwaukee?

A. Oh, yes, I have seen it used outside, in other places.

Q. Where the street is covered with asphalt otherwise?

A. No, not where the street is covered with asphalt.

Q. What I meant was whether you have known of the street railway zone being improved with macadam where the other street is asphalt?

A. No.

Q. It was confined to Milwaukee entirely?

A. Yes.

212 DUDLEY MONTGOMERY, being first duly sworn, testified in behalf of the defendant as follows:

(Examined by Mr. Schubring:)

Q. You live here in the city, Mr. Montgomery?

A. Yes, sir.

Q. What office do you hold with the street railway company, the defendant here?

A. Vice president and superintendent.

Q. What are your duties as such officer?

A. The duties of construction, track, buying cars, buying material, operating the cars, care of the men,—everything in regard to operation.

Q. You have attended a special course in engineering at the university, have you not?

A. Yes.

Q. And hold an engineering degree?

A. Yes.

Q. What is the degree?

A. Mechanical engineer.

Q. How long have you been superintendent of the local system?

A. Six years.

Q. And as part of your duties, do you make it a point to be familiar with the conditions and the right of way conditions of the railway zone in the city?

A. Yes.

Q. Have you done that as to the railway zone on University avenue between Park street and Charter street here in issue?

A. Yes.

Q. When if it all was the track on University avenue between those streets relaid?

213 A. From Park to Mills street in 1906, and from Mills street to Charter in 1908.

Q. Now will you describe what that improvement involved?

A. Tearing out the old track, cutting a ditch eighteen inches deep, putting in six inches of crushed rock, the ties laid on that, and the rails laid on top of the ties, filling around the ties and up to the top of the rails with crushed stone, rolling it, screening it and re-rolling it, and making a macadam finish out of it.

Q. How many inches of crushed stone were placed underneath the ties?

A. Six inches.

Q. What about the kind of rail that was used?

A. Six-inch T rail.

Q. And it was laid up to the grade furnished by the city engineer?

A. Yes.

Q. When was the improvement from Mills street to Charter street and beyond made?

A. 1908.

Q. What was the nature of that improvement?

A. The same nature as the other.

Q. Now from the time that this new rail was laid, as you have described, up to the time, the spring of 1910, or the time this improvement of asphalt pavement was made, what was done about keeping the macadam between the rails and one foot on the outside in repair?

A. There was a little work done in 1908 in the way of repair between Park street and Mills street, and there was further work done in the same two blocks in 1909, more extensive.

214 Q. What was the condition of the street railway strip between the rails and one foot on the outside of it as to its condition of repair in 1910, at the time the improvement was ordered and when it was made?

A. It was in first class condition.

Q. Something was said here, Mr. Montgomery, about the macadam between the rails having a groove, near the intersection of Park street and University avenue, being from three to four inches lower than the top of the rail. If that were the condition, what would be the fact as to the tie-rods holding the rails together?

A. The tie-rods would be above the macadam, would be very noticeable, and especially to drive over them.

Court: How far are these tie-rods below the rail?

A. The center of the tie-rod is three inches below the top of the rail, and the tie-rod is seven-eighths inches in diameter.

Mr. Ryan: How far apart are they?

A. Every ten feet.

Q. Now was there anything special that called to your attention the condition of this railway strip as to its condition of repair in the spring of 1910?

A. The only thing that called my attention to it was the fact that we were ordered to put in asphalt at the time, and this question that we are now discussing came up at that time.

Q. And you were presented with the question as to the condition of repair of that right of way?

A. Yes.

Q. And did you make an examination of it at that time?

A. Yes.

215 Q. Did you make any examination or any investigation into the improvements that had been made before?

A. Yes.

Q. And the repairs that had been made?

A. Yes.

Q. So that the condition of repair of that railway strip was called to your attention at that time?

A. In 1910, yes.

Q. Now have you had occasion, Mr. Montgomery, as superintendent of the street railway company to purchase material and equipment for the company?

A. Practically all of it since the fall of 1906.

Q. Have you in that way become familiar with the cost of material?

A. Yes.

Q. Have you also become familiar with the cost of construction of the track and overhead construction of street railway systems?

A. Yes.

Q. I will ask you whether you have also had occasion in connection with your management and study of street railways to know something about horse car systems and the manner in which they are operated?

A. Somewhat, yes.

Q. Have you had occasion to observe such systems in operation?

A. Yes.

Q. Have you ridden on cars?

A. Yes.

Q. In what way so far as equipment for purposes of operation is concerned does the equipment of an electric street railway differ from a horse street railway?

216 Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, the witness not qualified to answer with reference to horse street railway systems.

Objection overruled.

Exception by plaintiff.

A. Well, in the track equipment the rails and ties of the electric railway are heavier and the rails are bonded for carrying electric current, whereas in the horse street railway, the cars not being so heavy, there is no need of such a heavy rail nor such a heavy tie,

nor the same ballast. As far as cars go, from general observation the old horse cars were lighter, more simply built, than the cars that immediately followed them in the electric railway business. Had no motors and consequently hadn't the strain of carrying that weight, and they were smaller. There was no poles or overhead wires necessary or any wires of any kind in the horse car business.

Q. Did you observe any difference in the matter of employes?

A. Well, only that I remember very well in the old days they used to have one employe on a horse car, whereas they had to have two, had ordinarily two on the electric cars.

Mr. Ryan: I understand that all this testimony in respect to horse cars is objected to?

Court: It is taken subject to your objection.

Q. Now from your knowledge of the cost of materials and equipment and your observations of horse cars and your study of the matter and of the equipment, the difference of equipment between the two, what would you say as to which was the more costly to construct?

A. The electric system of course is more costly.

Q. Could you give any comparison as to the degree in the difference of cost?

217 Objected to for the reason that the witness is not qualified. Objection overruled.

Exception by plaintiff.

Q. In a general way. Would it be a great or small?

A. Oh, the difference is large.

Q. From your knowledge and your observation and your study, what would you say as to the difference in cost, if any, of operating an electric system over a horse car system?

A. It is very much more expensive.

Q. Assuming that the avenue were paved with asphalt on both sides of the street railway zone and the street railway zone were left macadam, what do you say as to the ease with which vehicles could cross the street railway zone, that being of macadam, if kept in repair?

A. It would be perfectly easy.

Q. Now returning to the conditions there in 1910 as you have observed them, what do you say as to whether it was easy or difficult for vehicles to cross the railway strip?

A. It was very easy for them to cross.

Q. In the condition of repair in which the street was at that time?

A. Yes.

Q. Where did much of the travel on University avenue go, what part of the street?

A. On the street railway zone.

Q. Why was that?

A. Only from speaking with the teamsters and the people who used the street,—because that was the only decent part of the street.

Q. Had the company, or yourself as superintendent of the com-

pany, ever received any notice from the city, or any of the city authorities, that your railway strip to Park street to Charter street was not in repair?

218 A. Never.

Q. Have you ever received a request from the city or any official of the city that this strip was out of repair and should be put in repair?

A. No.

Q. Had any complaint of any kind been made to you or to your company by the city or any of its officials that your railway strip between those streets was out of repair?

Mr. Ryan: Objected to as irrelevant, incompetent and immaterial, for the reason that it is admitted in the answer that they were notified and an ordinance was enacted requiring them to improve it, and served upon them, and they received notice of that.

Objection overruled.

Exception by plaintiff.

Mr. Ryan: I object to it as irrelevant, incompetent and immaterial because it was their duty to repair.

Objection overruled.

Exception by plaintiff.

A. No.

Q. Were you, and was your company, willing at all times to repair and keep in repair that strip between your tracks and one foot on the outside, between the streets in question?

Objected to as irrelevant, incompetent and immaterial.

Objection overruled.

Exception by plaintiff.

A. Yes.

Q. Were you willing at all times to keep it properly surfaced?

Same objection.

Same ruling.

Exception by plaintiff.

A. Yes.

Q. In the condition in which it was in the year 1910 at the time the street was ordered improved, was it a question of repair of the street, if it was out of repair, or was it a question of recon-

219 structing, repaving it?

Objected to as irrelevant, incompetent and immaterial, calling for a conclusion.

Objection sustained.

Exception by defendant.

Q. The condition in which the street was as you observed it there in the spring of 1910, if it required any change or improvement, what do you say as to whether that improvement merely called for repair or whether it called for the entire reconstruction of the macadam between the tracks and one foot on the outside thereof?

Same objection.
Objection sustained.
Exception by defendant.

Q. Were you willing in the spring of 1910 and up to the time the asphalt pavement was ordered and put in and at all times prior thereto, to keep the portion between the rails and one foot on the outside of the rails of each tracks in proper repair so as not to interfere with travel over the same and to conform the grade of your track to the asphalt pavement if the city determined to build it.

Objected to as irrelevant, incompetent and immaterial, calling for a conclusion, and as already answered.
Objection overruled.
Exception by plaintiff.

A. Yes.
Q. Now, Mr. Montgomery, up to the time of the improvement of University avenue with asphalt, what was the street improvement along the streets upon which you operated your system of street railway?

Mr. Ryan: Objected to as immaterial, for the reason that the other streets are subject to differ- traffic and as to kind and amount.
Objection overruled.
Exception by plaintiff.

220 A. There was asphalt around the capitol park, and all the rest of the streets were either macadam or dirt.
Q. The only asphalt improvement that there was on any of the streets on which you operated the line at that time were the eight blocks around the capitol square?
A. Yes.
Q. Now, Mr. Montgomery, as an official of the company, I ask you what the claim has been by your company at all times to the city, as to whether the franchise of 1892 under which you operated was a contract with the city or not?

Mr. Ryan: Objected to as incompetent, irrelevant and immaterial, and calling for a construction of a document, which is a matter for the court.
Objection sustained.
Exception by defendant.

Mr. Schubring: The only reason we are asking this is, we are raising in our answer the proposition that this is a contract, and a federal question, and I merely want to make it perfectly plain to the court that we are raising the question that this is a contract, and that if we are ordered to make this improvement, it is an impairment of the contract under the constitution of the United States.
Court: You say your answer raises that.
Mr. Schubring: I merely wanted to make sure, and that is the only purpose in answering the question.
Court: The ruling may stand.

Mr. Schubring: Now I would like to ask one other question to make the record perfectly plain: I ask you, Mr. Montgomery, whether it has not always been the claim of your company that the franchise of 1892, under which you are operating, was a contract between you and the city, and that such claim on your part has repeatedly been made to the city officials and was made at
221 the time this improvement was ordered, and that if you were compelled to put in this improvement or required to pay its cost, that it would be an impairment of your contract with the city and a taking of property without due process of law in violation of the constitution of the United States.

Court: I take it that if you have any authority upon that you will give me the benefit of it.

Mr. Schubring: The only question is this, that the Supreme Court of the United States has held that that question must be specifically raised. Now it may be sufficient to raise it by the answer. In some of the cases they have intimated that if it were in the brief, that might be enough, but as I remember the cases as a rule the attorneys tried to bring that question right into the record by asking the witness the proposition, so that there could be no question about it.

Court: I don't see that it can add anything to your answer, but the answer may be taken simply as a matter of precaution.

Exception by plaintiff.

A. We have maintained that position, yes.

Cross-examination by Mr. Moran:

Q. Now you say that you improved University avenue from Park to Mills in 1906?

A. That is when we laid that new track.

Q. Well, did you improve the railway zone?

A. Yes.

Q. You improved the railway zone from Mills to Charter in 1908?

A. Yes.

Q. Now in 1908 you had to do some repair work on that street, didn't you, outside of that?

222 A. Between Park and Charter streets, you mean?

Q. Yes.

A. We did a very little of repair work in 1908.

Q. In 1909 you had to do considerable repair work?

A. We did quite a little in 1909.

Q. So that the improvement that you made in 1906 and 1908 when you reconstructed, as you say, your tracks hadn't made that street so that you could get along without having improved it some more in 1908 and 1909?

A. We didn't improve from Mills to Charter in 1909. We improved between Park and Mills.

Q. Improved between Park and Mills?

A. In 1909.

Q. And also in 1908?

A. One or two holes in 1908.
Q. So that the street had to be improved each of those two years?
A. Either partially or in whole.
Q. And yet you say that the street was in good condition in 1910, didn't need any repairing?
A. It did not.
Q. Was the traffic less in 1909 and 1910 than it was in 1908 and 1909?
A. Not that I know of.
Q. Was it greater?
A. Not that I know of.
Q. Now you say that the difference in the cost of equipment of an electric railway system and a horse railway system is very great?
A. Yes.

223 Q. The difference in the income to the company from the use of the horse railway age and the electric age is just as much different, isn't it?

A. Not to my knowledge.
Q. Well, it is a great deal different, isn't it?
A. Now and twenty years ago, do you mean?
Q. Yes.
A. I should say it was different between now and twenty years ago, yes.
Q. The income of the company at present per car is a great deal more than it was per car under the horse car age?
A. Oh, I should say it was, I should imagine it was. I don't know what it was when the horse car age was here.
Q. You do know that it would be a great deal more now?
A. I imagine that it would, yes.
Q. Well, do you know as much about the income as you do about the cost, as to the horse car and the electric car age?
A. No.
Q. All you know about it is the cost, comparative cost I mean?
A. I know more about that, yes.
Q. The only streets upon which asphalt was laid at the time that the improvement was made on University avenue was on street car lines, was it not?
A. Yes.

Mr. Schubring: We desire to offer in evidence the record in the case of Four Lake Light & Power Company v. Madison City Street Railway Company in this court, for the purpose of showing a receivership in the year 1894; and the records in the Federal courts here for the Western District of Wisconsin in the case of New York Guaranty & Indemnity Co. vs. Madison City Railway Company,

224 being the receivership in that court of 1896.

Mr. Schubring: I presume that the court will take judicial notice of population. Otherwise I should want to offer in evidence here the census reports disclosing the population of the city for the year 1880 and the year 1890.

Mr. Ryan: The offer is objected to for the reason that it is irrele-

vant, incompetent and immaterial and does not come within any issues raised in this case, there being no allegations in the answer that would justify the admission of these records.

Court: They may be received subject to the objection.

Exception by plaintiff.

Mr. Schubring: For 1880 it is 10,324. For 1890 it is 13,426. These figures were taken from the Wisconsin Blue Book, not directly from the United States census, but I suppose they are correct.

Mr. Ryan: I presume we can get them for 1900 and 1910 and put them in?

Mr. Schubring: Yes. All right.

GEORGE SULLIVAN, being recalled, examined by Mr. Schubring, testified as follows:

Q. Mr. Sullivan you knew the old horse cars?

A. Yes sir.

Q. I wish you would look at that picture, published in Madison Past and Present, which was published here a few years ago, and see if that is about the way they used to look?

A. Yes, it is something similar, that's sure.

Defendant then offered in evidence the picture identified by the witness, marked Exhibit 7.

Objected to as immaterial.

225 Taken subject to the objection.

Exception by plaintiff.

Said Exhibit 7 so received in evidence is attached to and made part of this bill of exception.

Plaintiff then offered in evidence the following records from the office of the register of deeds for Dane County, Wisconsin:

Vol. 4 Miscellaneous, page 320.

Deeds.	Mortgages.
134, page 326	126, page 138
134, pages 334, 336, 337,	145, page 169
144, page 391	146, page 432
154, page 152	166, page 336
154, page 456	
154, page 457	
168, page 164	
168, page 55	
168, page 119	
175, page 254	
186, page 190	
186, page 446	
186, page 562	
194, page 458	

Plaintiff also offered in evidence the articles of incorporation of the defendant company.

Court: I will not rule upon these matters until you have had time to examine them and make your objections.

226 It is stipulated by and between the parties hereto that there is a series of conveyances whereby the Madison Street Railway Company, the grantee of the ordinance of 1884, by apt words of conveyance, transferred all its real and personal property including franchises, through its successors to the defendant company, but without specifying the franchises except that in one of the conveyances in said series, being a deed dated August 31, 1901, in which the Madison Electric Railway Company is grantor and the Madison Traction Company is grantee, the grantor conveys as follows: "All its property and franchises and ordinances and all its street railway property, etc., and all its rights under a certain ordinance to the Madison Street Railway Company, passed and approved on March 8, 1884, by the City of Madison, entitled an ordinance conveyance certain rights and privileges upon the Madison Street Railway Company and all rights and privileges of an ordinance conferred on the Madison City Railway Company and amendatory of an ordinance conveying certain rights and privileges upon the Madison Street Railway Company, passed and approved February 26, 1889, and entitled an ordinance confirming certain rights and privileges to the Madison City Railway Company and relating to and extending the time for constructing certain parts of the line and amendatory of an ordinance conferring certain rights and privileges of an ordinance to the Madison Street Railway Company and all rights and privileges of an ordinance to the Madison City Railway Company passed and approved June 10, 1892, entitled an ordinance granting the use of streets and bridges for the operation of an electric railway to the Madison City Railway Company. And an ordinance granting the use *and* the streets and bridges for the operation of a street railway to Wm. T. Fish and H. C. Adams passed by the Town Board of the Town of Madison October 25, 1895, subject to a trust deed for $150,000 bond issue to the Savings Trust Co. of Cleveland." Vol. 175 of Deeds, page 254.

227 This being all the testimony offered and given on both sides, the testimony was then closed.

228 STATE OF WISCONSIN,
Dane County, ss:

I hereby certify that I have carefully compared the foregoing with the shorthand notes taken by me on the trial of the above entitled action and find the same to be a full, true and correct transcript thereof and containing all the testimony taken and proceedings had on said trial.

Dated May 26, 1913.

EDWARD H. SMITH,
Official Reporter Ninth Judicial Circuit.

229 The following is a list of the Exhibits offered in evidence:

Exhibit 1, map showing plan and profile of the street asphalt pavement that accompanied the specifications for the im-

provement of University Avenue from Charter street to Francis Street, adopted by the Common Council May 13, 1910.

Exhibit 2, proposal, specifications and contract for asphalt pavement.

Exhibit 3, contract for the specifications between Andrews Asphalt Paving Co. and the Common Council, of the City of Madison.

Exhibit 4, Power of attorney to S. M. Ferris from National Surety Company.

Exhibit 6, Blue print showing cross section and plan to govern the manner of the improvement of the strip occupied by the street railway track.

Exhibit 7, Picture published in Madison Past and Present.

230 In the Matter of the Improvement of University Avenue.

Agreement Between the City of Madison and the Southern Wisconsin Railway Company.

"Whereas the city of Madison sometime since decided to improve with asphalt that portion of University Avenue between Park Street and Charter Street in the City of Madison and has let the contract therefor, and the contractor is now at work and his work has now proceeded as far as the railway track of the street railway at Park street, and,

Whereas the Southern Wisconsin Railway company occupies the central portion of that portion of said Avenue from Park street to Charter street with its line of street railway, and,

Whereas the city claims it necessary that the railway strip be improved in substantially the same manner as the remainder of the street in so far as the concrete foundation and asphalt top are concerned, and the city claims it is very necessary that said work should be done at the same time, and

Whereas the City of Madison insists that it is the duty of the Railway Company, under its franchise and the laws of Wisconsin, to grade, pave and otherwise to improve that portion of said Avenue between its rails, and one foot on the outside of each rail to correspond generally with the proposed improvement of the Avenue and has heretofore ordered and directed the Railway Company, that it do such work as therein directed, and,

Whereas, the Street Railway Company insists that such is not its duty and on demand by the City, has refused and still refuses to do said portion of said work, except to grade.

Now therefore, to the end that the work of grading, paving and otherwise improving that portion of University Avenue from Park Street to Charter Street, may not be delayed, and that the work may all be done at one time, thus insuring much better results, and to the end that the legal rights and duties of the City and of the Railway Company, in case of such improvement may be finally determined and with the least delay.

It is hereby stipulated and agreed, 1. That the city of Madison shall order and cause the improvement Company to which the con-

tract for the paving and improvement of said Avenue has been let, to pave that portion of University Avenue between Park Street and Charter Street, between the rails of the Southern Wisconsin Railway Company and one foot on the outside of each rail thereof in accordance with the plans and specifications hereto annexed and made a part hereof, marked "Exhibit A," and under the supervision of the engineer of said Railway Company.

231 2. That the cost of such work will be in the first instance paid by the city of Madison with the specific understanding and agreement, however, that it is the intention hereof that the party charged with the duty of doing said work shall pay therefor and that the right and duty of the city and said railway company in the premises shall be determined and that on or before the completion of said work the City of Madison shall bring suit if it so elects in the Dane Circuit Court to recover the amount so paid for the paving and improving of said railway strip by the city.

It being understood also that the city may institute such suit as soon as any part of said work has been paid for by the city and no claim shall be made that such suit is prematurely commenced so that the issue may be tried in the October term of said Court, if possible, so that an appeal may be taken to the Supreme Court and to the United States Supreme Court should either party so desire.

3. That said action may be a simple civil action for the recovery of the sums so paid by the city and that any and all questions respecting the nature, kind or form of said action, the regularity of the letting of the contract for the improvement of the Avenue or the ordering the work in question and the form or sufficiency of the proceedings of the city, looking to the improvement of the railway strip and the cost and nature of the work, shall be waived to the end that there may be prompt determination respecting the merits of the matter in issue.

4. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave that portion of the Avenue herein referred to as occupied by its track, that the street railway company shall immediately repay to the city the amount paid by the city for said work on said right of way together with interest from the date of payment thereof by the city to the contractor.

5. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave the strip in question that the city will not insist on its claim for any penalty for the failure of the railway company to have completed said work within the time specified.

This agreement shall bind the parties hereto, their successors and assigns.

Dated this 20th day of August, A. D. 1910.

(Signed) JOHN A. AYLWARD.
JONES & SCHUBRING,
Attorneys for Southern Wisconsin Railway Co.

(Here follows map marked page 232.)

233 (Endorsements:) Exhibit "A." Agreement between City of Madison and Southern Wisconsin Railway Company. In re Work on University Avenue. Duplicate Original. Exhibit 6. E. H. S. Circuit Court, Dane County. Filed Feb. 27, 1913. Nissen P. Stenjem, Clerk. Filed Jul- 28, 1913. Clarence Kellogg, Clerk of Supreme Court, Wis.

(Here follows Exhibit No. 7, "Madison, Past and Present," marked pages 234 and 235.)

236 Thereafter the said court made and filed its Findings of Fact and conclusions of law.

Thereafter defendant made request for the following Findings of Fact and Conclusions of law:

Findings of Fact.

1. That the portion of University Avenue from Park Street to Mills Street lying between the rails of the defendant and one foot on the outside thereof was on July 11, 1910, and had been prior thereto in good repair so as not to interfere with travel over the same.

2. That prior to July 11, 1910, all permanent street improvements in the City of Madison had been of macadam, except the eight blocks around the capitol park which had been paved with asphalt.

237 3. That macadam improvement is well adapted to the kind of traffic to which University Avenue is subjected.

4. That it is practicable and feasible to maintain the railway zone of macadam with asphalt on either side and keep the same in such repair so as not to interfere with travel over the same.

5. That the City of Madison at no time informed the defendant or any of its officers or agents that the portion of University Avenue from Park Street to Charter Street between the rails of the defendant and one foot on the outside thereof was out of repair, or made any request that the same be placed in repair.

6. That the defendant was at and prior to July 11, 1910, able, ready and willing to keep the portion of University Avenue from Park Street to Charter Street between its rails and one foot on the outside thereof in good repair so as not to interfere with travel over the same.

Conclusions of Law.

1. That to require the defendant to pay the cost of the pavement between its rails and one foot on the outside thereof would be an impairment of the contract between the defendant and the City of Madison under which the defendant is operating its line in violation of the United States Constitution and the statutes and especially of Article 1, Section 10, of the United States Constitution, and would be depriving the defendant of property without due process of law in violation of the fifth amendment to the United States Constitution.

2. That the defendant is entitled to judgment dismissing the complaint and for its costs and disbursements to be taxed according to law.

Which said requests were refused, and thereafter defendant filed its exceptions to the Findings of Fact and Conclusions of Law of the Court and to the refusal of the Court to make Findings of Fact and Conclusions of Law as requested by the defendants as follows:

1. It excepts to that portion of the second Finding of Fact of the court herein which reads as follows:

"That this portion of University Avenue was subject to very heavy traffic during the years from 1906 to 1910 inclusive, which quickly

ground up the crushed stone and rendered the macadam along the track defective and out of repair."

2. It excepts to all and every part of the third Finding of fact heretofore entered herein.

3. It excepts to the whole and every part of the fifth Finding of Fact heretofore entered herein.

4. It excepts to the Conclusion of Law herein entered.

5. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

238 "That the portion of University Avenue from Park Street to Mills Street lying between the rails of the defendant and one foot on the outside thereof was on July 11, 1910, and had been prior thereto in good repair so as not to interfere with travel over the same."

6. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

"That prior to July 11, 1910, all permanent improvements in the City of Madison had been of macadam, except the eight blocks around the capitol park which had been paved with asphalt."

7. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

"That macadam improvement is well adapted to the kind of traffic to which University Avenue is subjected."

8. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

"That it is practicable and feasible to maintain the railway zone of macadam with asphalt on either side and keep the same in such repair so as not to interfere with travel over the same."

9. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

"That the City of Madison at no time informed the defendant or any of its officers or agents that the portion of University Avenue from Park Street to Charter Street between the rails of the defendant and one foot on the outside thereof was out of repair, or made any request that the same be placed in repair."

10. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Finding of Fact:

"That the defendant was at and prior to July 11, 1910, able, ready and willing to keep the portion of University Avenue from Park Street to Charter Street between its rails and one foot on the outside thereof in good repair so as not to interfere with travel over the same."

11. Defendant further excepts to the refusal of the Court to make on request of the defendant the following Conclusion of Law:

"That to require the defendant to pay the cost of the pavement between its rails and one foot on the outside thereof would be an impairment of the contract between the defendant and the City of Madison under which the defendant is operating its line in violation of the United States Constitution and the statutes and especially of Article 1, Section 10, of the United States Constitution, and would

e depriving the defendant of property without due process of law in iolation of the fifth amendment to the United States Constitution."

12. Defendant further excepts to the refusal of the Court to make n request of the defendant the following Conclusion of Law:

"That the defendant is entitled to judgment dismissing the com-laint and for its costs and disbursements to be taxed according to law."

39 And because the foregoing evidence, rulings, instructions and exceptions do not appear of record, I the undersigned E. Ray Stevens, the Judge before whom said cause was tried, have n due notice settled and do hereby sign and settle this bill of excep-ions to the end that the same may be made part of the record herein his 17th day of June, 1913.

And I further certify that the foregoing bill of exceptions contains ll the testimony and evidence introduced at said trial and all the ulings, requests, instructions and exceptions made on the trial of aid action, including the exhibits hereto attached and designated xhibits 1, 2, 3, 4, 5, 6, and 7.

E. RAY STEVENS,
Circuit Judge.

Dated June 17th, 1913.

40 (Endorsements:) State of Wisconsin, Circuit Court for Dane County. City of Madison, Plaintiff, vs. Southern Wis-onsin Railway Company, Defendant. Return to Supreme Court. iled Jul- 28, 1913. Clarence Kellogg, Clerk of Supreme Court. Vis. Filed: Circuit Court Dane County, Wis. Jun- 17 1913. Nis-en P. Stenjem, Clerk.

41 *Return to Supreme Court.*

TATE OF WISCONSIN,
Dane County, ss:

In Circuit Court for Dane County.

I, Nissen P. Stenjem, Clerk of said Court, do hereby certify that he foregoing and annexed paper writings are the original Summons Complaint with admission of service; Answer, with admission of rvice, Findings of Fact and conclusions of law; Judgment; Bill Exceptions; Notice of Appeal to Supreme Court and Undertaking n Appeal which have been filed in my office in the action wherein ity of Madison is plaintiff, and Southern Wisconsin Railway Com-any is defendant, and that the same are hereby transmitted to the udges of the Supreme Court, of the State of Wisconsin, in pursu-nce of said notice of appeal.

In testimony whereof, I have hereunto set my hand and affixed he seal of said Court, at the City of Madison, in said County, this 8th day of July A. D. 1913.

[SEAL.] NISSEN P. STENJEM, *Clerk.*

242 And afterwards on the 15th day of January, A. D. 1914, the same being the third day of said term, the following proceedings were had in said cause in this Court:

Dane Circuit Court.

CITY OF MADISON, Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by E. J. B. Schubring, Esq., for the said appellant, and by William Ryan, Esq., for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

243 And afterwards, to-wit: on the 17th day of March, A. D. 1914, the same being the sixteenth day of said term, the judgment of this court was rendered in words and figures following, that is to say:—

Dane Circuit Court.

CITY OF MADISON, Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

Opinion by Justice Marshall.

This cause came on to be heard on appeal from the judgment of the circuit court of Dane County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the circuit court of Dane County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Forty-eight & 50/100 Dollars ($48.50).

Justice Barnes dissents.

Justice Siebecker took no part.

244 Thereupon the opinion of the Court by Justice Marshall and the dissenting opinion of Justice Barnes were filed in words and figures following, that is to say:

245 August Calendar, 1913.

STATE OF WISCONSIN:

In Supreme Court, January Term, 1914.

January Term, 1914.

No. 205.

CITY OF MADISON, Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

Syllabus.

1. In general, a statute covering the subject-matter of a former enactment repeals it.

2. Whether an entire statute was impliedly repealed by a later one covering, in general, the same subject is a matter of legislative intention.

3. Repeals by implication are not favored and so an earlier enactment is not deemed repealed by a later one, unless the two cannot reasonably consist with each other.

4. Where a revision of an earlier law expressly repeals all prior acts and parts of acts inconsistent therewith, a purpose appears to retain such parts of the former as are not clearly repugnant to the latter.

5. The last rule restricts the first but does not save a substantial characteristic of the earlier enactment, omitted from the later one; the earlier enactment, thus characterized, and the later one, not so featured, are, in general, to be regarded as inconsistent and the former as falling under the fourth rule.

6. A statute obviously intended to supersede an earlier enactment, so supersedes, without any express repeal, thus annulling any particular provision of the later not incorporated into the former.

7. The stated rules for statutory construction are general, in respect to the situation to which they respectively apply, but are subservient to the supreme rule that the purpose of the legislature should be vitalized by judicial construction when it can be discovered from the whole enactment, by itself, or in connection with others or any circumstances characterizing it,—the intention being regarded as matter of fact, determinable by evidentiary rules and circumstances.

246 8. In case of a city ordinance being ambiguous, in that, read literally, or from some permissible viewpoint, the legislative body evinced gross carelessness in conserving the public interests, it is to be presumed there was no such purpose, and that should prevail if, by any reasonable construction, a cast can be given to the enactment consistent with due care.

9. In case of a superseding street railway ordinance which is com-

plete in itself, but omitting features of the former ordinance which characterized it as a whole or containing new features, giving significant cast thereto, with a repealing clause as in rule 3, the words "all acts" should, ordinarily, be regarded as not limited by the words "parts of acts."

10. In general, in case of a public utility franchise reasonably susceptible of two meanings, giving rise to uncertainty as to which was intended, the language used should be construed favorably to the public interests.

11. In case of a superseding street railway franchise, granted by a common council, containing a condition burdening the grantee to keep the railway zone "in proper repair" and "in proper order and cleanliness" in the words of the original franchise, but omitting a particular condition of the latter, common to such franchises, burdening the grantee with the duty to pave and repave, as needed, the street within the railway zone; but framed so as, in the whole, to clearly evidence a purpose to burden the grantee with responsibility for the proper condition of the railway zone, the words "proper repair" and "proper order" should be given the broad meaning of including pave and repaving, where "proper repair" and "proper order" would reasonably call therefor in the judgment of the governing body of the grantor.

12. A franchise duty, imposed on a street railway company to keep its railway zone in "proper order," is a continuing obligation, including duty to conform the character of the railway zone to the physical condition of the street outside thereof, as such condition, in the judgment of the governing body of the grantee, may from time to time be changed to accommodate the needs of the people.

13. A legal principle having been developed and declared in general, it applies to all situations within its scope, and is not limited to the particular situation suggesting it. The rule for the future is a part of the unwritten law which rests in principles, not merely in cases referred to for illustration.

14. The omission from a street railway franchise of a specific requirement of the old grant requiring the grantee to pave and repave the railway zone, as needed in the judgment of the grantor, but retaining the former requirement to keep the railway zone in "proper repair" and "proper order" and adding a new feature expressly making the grant "subject to such reasonable rules and regulations respecting the streets and highways as such council may from time to time enact," should be regarded as clearly intending to burden the grantee with the duty of keeping the railway zone in such condition as the grantor may reasonably require, changing the physical condition, from time to time, to that end.

15. A street railway company franchise granted upon the conditions mentioned, emphasizing the duty of the grantee under section 1862 of the Statutes, should be construed in the light of State ex rel. Att'y Gen. v. Madison, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771, as reserving to the grantor authority to make regulations, from time to time, as regards paving and repaving the railway zone.

16. The term "regulation," as used in respect to the police power,

is very comprehensive, extending to requirements as to creation of physical conditions and of preserving the same and of creating other conditions from time to time.

17. The term "reasonable rules and regulations" of "the highway as the council may from time to time enact," when used in a street railway franchise and as used, in effect, in the statute, § 1862, should be construed with regard to the broad comprehensive meaning of the term regulation, the length of such a grant, the probable necessity for changes, from time to time, in the structural character of streets, the importance of absence of divided responsibility for the physical condition of the railway zone and all other characterizing circumstances.

18. A municipality, with the broad powers of regulation as regards streets, may make reasoning regulations burdening a public utility using the street with the duty to make, at its own expense, reasonable changes in the physical condition of the zone so used, irrespective of anything contained in the public utility franchise, and this broad power, it is under disability to contract away.

Syllabus by Marshall, J.

247 STATE OF WISCONSIN,
In Supreme Court:

August Term, 1913; January Term, 1914.

CITY OF MADISON, Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

Appeal from a Judgment of the Circuit Court for Dane County—E. Ray Stevens, Judge. Affirmed.

Action to Recover of Defendant the Cost of Paving that Portion of a Street Between its Railway Tracks and One Foot Outside the Rails.

The question was whether defendant's franchise required it to bear the expense of the pavement in the particular region. From the time of its organization up to 1892, defendant operated under a franchise containing the following provision:

"Section 3. Whenever any street upon which any of said tracks may be located shall hereafter be paved or macadamized, the said railway company shall pave or macadamize the roadbed between and one foot on either side on the outside of the rails of the track of their said road, and shall at all times make and keep the track between and one foot on either side on the outside of the rails thereof equally as good as the streets shall be outside of their tracks, and shall correspond in surface and improvements with said street outside of said track."

248 That franchise was in existence when the paving in question was done unless repealed by a franchise granted defend-

ant in 1892 under which it was operating when such work was done. The new franchise was complete, in itself, being so framed as to cover all features of street railway construction, maintenance and operation. It was granted to authorize displacement of the old horse car system by a modern electric system, and contained this repealing language:

"All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

The new franchise, in general, was worded the same as the old one with such changes as would make it adaptable to the use of electricity as a motive power. It differed in sufficient respects to be, as a whole, in conflict with the old franchise, though by far the greater part was substantially a re-enactment of the existing ordinance. The provision before quoted from the old franchise with reference to paving between the tracks was not carried into the new one. The language of the old franchise preceding the particular clause, and the language following, were substantially reproduced in the new one leaving the particular clause wholly absent from the latter. The remaining language which, without material difference, is common to both franchises, is as follows:

"(*b*) It shall be the duty of said company to repair any and all damages done to the streets, macadamized curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the streets as herein provided for; and further to protect and save harmless the City of Madison against all claims for damages arising from the construction, operation or management of the railway provided for herein."

In 1910 the common council of plaintiff, by due proceedings, determined to pave University Avenue between Charter Street and Park Street with asphalt on a concrete foundation, and by ordinance passed June 10, 1910, ordered the defendant to likewise pave that portion of the street between its tracks and for one foot outside its rails. Defendant denied liability in that regard. Whereupon it was agreed that plaintiff should incur the expense of paving the entire street and then test its claim against the defendant by an action to recover the reasonable value of the work done within the railway zone. Such proceedings were duly had pursuant thereto that judgment was recovered against defendant for $4,567.64.

The pleadings and evidence show the facts stated. These additional matters are covered by the findings: The right of defendant to use the streets of plaintiff are referable to the franchise of 1892
requiring it to keep the space between the rails of each track
249 and for the space of one foot on the outside in proper repair
so as not to interfere with travel over the same." Prior to the paving in question the particular street had not been permanently improved. Portions thereof had been covered with crushed stone and defendant had likewise filled that part occupied by its tracks. The use of the street was such, prior to the paving in question being ordered, as to render the existing macadam unsuitable. Prior to July 11, 1910, the street within the railway zone was so out of repair as to render it unfitted for use by traveling across the tracks.

A macadam made of crushed stone is not a proper pavement for the particular street under the circumstances existing. In case of the railway zone being so paved the surface would wear down between the tracks so that travel across the same would cause injury to the pavement outside such zone by disintegration of the unsuitable macadam pavement and parts thereof being deposited on the asphalt surface.

The provision of the franchise particularly referred to in the findings is a re-enactment of the old ordinance. It is in these words:

"(*a*) And the same company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel and shall keep the same in proper order and cleanliness at its own cost and expense."

The latter ordinance contained a new provision making the granted privilege conditioned in that it should be "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact."

On the facts found as indicated judgment was rendered in favor of plaintiff.

MARSHALL, *J.*:

The following rules are guides for determining whether an act of legislation repeals an earlier act relating, in whole or in part, to the subject covered by the later one:

(1) 1. In general, a statute covering the subject-matter of a former statute repeals it. Lewis v. Stout, 22 Wis., 234; State v. Campbell, 44 Wis. 529.

(2) 2. Whether an entire statute was impliedly repealed by a later one covering, in general, the same subject-matter, is a question of legislative intention. Gilkey v. Cook, 60 Wis. 133, 18 N. W. 639.

(3) 3. Repeals by implication are not favored and that has such force that an earlier act is not to be regarded as repealed by a later one unless the two are so manifestly and materially in conflict that the two cannot, reasonably, stand together. Att'y Gen., etc., v. Brown, 1 Wis. 513; Att'y Gen., etc., v. Railway Cos., 35 Wis. 425; Milwaukee County v. Halsey, 149 Wis. 82, 136 N. W. 139; State v. Arnold, 151 Wis. 19, 138 N. W. 78.

(4) 4. Where an act revises an earlier law and expressly repeals "all acts or parts of acts inconsistent with it" a legislative purpose is manifest to retain such parts of the former act as are not clearly repugnant to the later one. Lewis v. Stout, 22 Wis. 234.

(5) 5. The rule last stated as to an act revising the subject-matter of an earlier law and containing an express repeal of all acts and parts of acts inconsistent therewith, is restrictive of the rule that a revising act without a repealing clause repeals the act revised; but does not apply so as to save a substantive part characterizing
250 the earlier act but omitted from the later one. The earlier statute so characterized and the later one omitting the particular feature are inconsistent and the former falls under the gen-

eral repeal of "all acts and parts of acts inconsistent with and conflicting with the provisions" of the later act. Smith v. City of Eau Claire, 78 Wis. 458, 47 N. W. 830.

(6) 6. A subsequent statute, evidently intended as a substitute for one revised, operates as a repeal of the latter without any express words to that effect and, so, any distinct provision of the old law, not incorporated into the later one is to be deemed to have been intentionally annulled. Smith on Statutory Construction, § 784; Bartlett v. King, 12 Mass. 537, 7 Am. Dec., 99.

(7) 7. The numerous rules for statutory construction on the subject of repeal of an earlier by a later statute, are general, in respect to the particular situation to which they respectively apply; but are subject to the ultimate purpose of giving effect to the legislative intent, when from the whole body of an act, or by a comparison of an enactment with others, or other circumstances characterizing the new enactment, it is clear that a repeal was not intended and the real purpose can be carried out by aid of judicial construction.

It is manifest from the foregoing, that it is not always easy to determine whether a provision in an earlier law, not carried into a later one, covering in general, the subject of the former, is preserved, repealed or annulled. Possibly no more striking instance of that can be pointed to than the repeal, in part, of the common law respecting perpetuities in personal property by incorporating the common into written law as to realty and omitting it as to personalty; as announced in Dodge v. Williams, 46 Wis. 70, 96, 1 N. W. 92, 50 N. W. 1103, became a matter of uncertainty nevertheless which continued for years, and was only substantially set at rest in Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924, and not so as to cease to be a subject of discussion until Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258.

(8-15) What is the legislative intention characterizing any particular enactment is largely a matter of fact to be determined from evidentiary rules and circumstances. That the ordinance in question was a general revision of the subject-matter of the earlier ordinance and would fall as an entirety, including the provision relating to paving, under the first rule, if it were not for the repealing clause and in the absence of some manifest intent from legitimate evidentiary circumstances to the contrary, does not admit of any serious doubt. Again, that the particular clause requiring the owner of the franchise to bear the expense of paving in the railway zone was left undisturbed by the second rule,—aimed at the prevention of live repugnant provisions,—if the new act, as a whole, or the particular part of it as regards the duties of the owner of the franchise respecting the railway zone,—is repugnant to or inconsistent with the former act or provision thereof on the subject, unless there be a manifest intent to the contrary from legitimate evidentiary indications, is likewise plain. Again, if the particular provision of the old charter was such a substantial ground of liability as to characterize the franchise as a whole, so that leaving it out of the new one renders the old, with such provision, inconsistent with the new without it, then such particular provision must be considered as having been an-

nulled under the sixth rule; unless it is manifest that the legislative purpose was not to treat any mere feature of the old charter, however important, as so characterizing the whole that the one with it could be deemed inconsistent, in the entirety to the one without it, so as to fall under the language of the repeal,—"All ordinances * * * heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

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Thus it is seen that, in a rather complicated situation like the one before us, to solve the controversy by reference to one general rule, closing our eyes to others, might be supported by very plausible logic and yet be very far from being true to the legislative purpose.

It might be said that, whereas there was a provision in the old ordinance requiring the owner of the franchise to pave the street area within the railway zone and there is none in the new one, there are no conflicting provisions on the subject, and so the one in the old ordinance is preserved by the plain repealing words of the clause that every part of the new ordinance can be given full effect and the particular provision, dealing with a subject omitted, be left undisturbed. But there stands the quite obvious circumstance that the city council intended to cover, by the last ordinance, all the relations between the city and the grantees of the franchise.

True, the specified repeal of portions of any existing ordinance inconsistent with the new one, in one view, is pregnant with the idea of there being portions of such existing ordinance to be repealed and portions to be preserved, but, when the subject is viewed, comprehensively, it is quite evident that the term "ordinances or portions thereof," coupling the two features together, was adopted without any definite idea of that kind; but rather in conformity to the ordinary way of closing a new enactment, designed to take the place of all prior laws on the subject. There would be no doubt but that, had the term "portions" not been used, the entire old ordinance would, plainly, stand repealed, both under the first rule mentioned and the sixth as well. It is difficult to read a contrary intent out of the new ordinance, since it seems quite plain that there were no "portions" of ordinances to be repealed, except such as were parts of the old entirety. Had it been intended to repeal part of such entirety and preserve part, it seems the common council would have more clearly repealed the idea,—which was liable to otherwise exist from the apparent purpose of the ordinance to make a complete arrangement with the owner of the franchise,—by providing that all portions of ordinances conflicting with the new one should stand displaced by the new one, and not referred to existing ordinances as entireties at all. In that is seen a pretty strong ground for the belief that the words "or portions" were not used to cut down the scope of the words "all ordinances" but were used, either in a perfunctory way, or as matter of caution lest there should be something existing between the city and the owner of the old franchise not fully covered by the term "all ordinances."

The latter view is strengthened by this: The clause of the old franchise under consideration was so important to the city that in an at-

tempt to re-grant the franchise, it could not be regarded as otherwise than gross carelessness to leave out such clause, unless the common council proposed to nullify it, or supposed the same obligation, especially as to existing paved streets, was covered by other portions of the franchise. Courts, ordinarily, deal with too much consideration for members of a legislative body to ground a decision on a theory of their having been grossly careless, where such a result can reasonably be avoided. In situations somewhat similar to the one we have before us, courts have said that rather than impute to members of a law-making body gross carelessness or mistake, it should be presumed there was an intent to eliminate that particular provision from the law. Goodenow v. Buttrick, 7 Mass. 142; Ellis v. Paige, 1 Pick. (Mass.) 43.

So if the term "or portions" in the repealing clause was given the cast of rather adding to than modifying the words "all ordinances," the particular clause in question would fall as part of the entirety under the fourth rule mentioned and it would fall, in any event, under the fifth rule. The clause created a specific duty and liability, as in Smith v. Eau Claire, 78 Wis. 458, 47 N. W. 830; therefore it was such a substantial part of the old ordinance and so characterized it that the new one, omitting it, was inconsistent therewith. In the cited case, there was substantially the same situation as we have here and it was held that the particular clause was displaced as a substantial part of the law of which it formed a part.

It follows that, principle and evidentiary circumstances concur in persuading us so strongly as to produce a conviction to a reasonable certainty that the intention in granting the franchise of 1892 was to make a complete charter, defining the rights, privileges and liabilities of the grantee as regards the city and displacing the
251 old charter, in its entirety with the special requirement as to paving in the railway zone.

There is no need of referring to other particulars than that already mentioned in which the new franchise departed from the old one in order to provide proper authorization for an entirely new street railway system. Suffice it to say, such new franchise, notwithstanding many points of similarity, was a recast of the old one with so many variations on so many particulars that, as a whole, there was sufficient conflict between the two to form a mark for the language of the repealing clause directed at all ordinances. Moreover, as before suggested, as the old franchise was the only one within the call of such repealing clause, it must have been within the contemplation of the common council of the respondent as the one repealed.

The result of the foregoing is that, at the time appellant was ordered by the city ordinance of June 10, 1910, to do the paving in question, there was no express requirement in its franchise on the subject. So if there was any authority to impose such a burden it must be found in some duty independently of written law, or read out of the general spirit of the franchise by construction, or the particular clause in respect to "proper repair," or found in the particular conditions upon which the rights of the grantee were made dependable. We will refer briefly to these features.

The new franchise, in the very nature of things, conferred upon the grantee a more extensive use of the street than the old one. That was necessary to the new system. The street was substantially surrendered to the grantee within the railway zone. True, the public right to use the street was reserved as before, but only subservient to the reasonable exercise of the new and greater right. The nature of the service contemplated by the new franchise and the physical construction to afford such service required the grantee to possess pretty broad powers as to the railway zone. It was clothed with all authority necessary to make the connections for the electric service, including a ground or metallic return for the electric current, and it could only do that and have proper capacity to keep its line and give good service, by being afforded the exclusive authority to do whatever was necessary in that regard and there being no divided duties as to physical acts in respect to the conditions of the railway zone. The technical nature of the construction, required or permitted, and of the work of exercising proper care always to have the railway system in good repair and working order, was inconsistent with the performance of work, in general, by respondent's employés within such zone which would interfere with its physical condition. Full authority in these respects was conferred, upon appellant, in letter and spirit as well, coupled with an express condition, not found in the old ordinance, making the grant "subject to all general provisions of statute law now in force and applicable thereto, and to such reasonable rules and regulations respecting such streets and highways and operation of cars * * * as the said common council may from time to time enact." There was also preserved in the new ordinance the provision of the old one in these words: "The road bed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said track at any and all points. * * * And said company shall keep the space between the rails of each track and for the space of a foot on the outside in proper repair so as not to interfere with travel over the same. * * *"

252 Counsel for respondent suggest that the decision of this court in State ex rel. Milwaukee v. M. E. R. & L. Co., 151 Wis. 520, 139 N. W. 396, in principle, rules this case in its favor. Much, if not all, there said as to the matter of construction applies here. It is there suggested that, in granting such franchises, the common council acts as the trusted agency of the people in conferring a valuable privilege, it gives a large number of private right- whereby a paramount privilege to use a portion of the street is surrendered, and the municipal authorities are in a great measure, displaced from exercising that control necessary to keep the ways in a proper condition for public travel, and it is the grantor's duty to exercise a high degree of care in performing its trust and, so, it must be presumed, in construing any doubtful franchise provision that the common council endeavered to execute such duty and all provisions of any franchise susceptible of being used as conflicting, should be read as favorably as reasonably in favor of the public.

Significance was given to the long franchise period,—thirty-seven years,—and the idea given prominence that the council, acting with the degree of care which it must be assumed it exercised, doubtless contemplated many changes in the character of the pavement would be required during such period and endeavored to protect the public in respect thereto.

Here the grant was for a still longer period than in the Milwaukee Case. It was for a street railway system in the capital city of the state and conferred at a time when existing pavements were liable very soon to become entirely unsuitable for such a city and be required to be replaced by new ones of permanent and modern character.

Therefore, considering the common manner of conserving public interests under the same or similar circumstances, if the council intended to eliminate the special provision of the old charter, and neither incorporated a substitute therefor into the new one nor prescribed any condition therein empowering the council to deal with the matters to which the old provision referred as occasions therefor might arise, it would seem to have grossly failed to perform its duty. The ordinance should have such construction as will avoid that result if that can reasonably be done.

Aided by logic as above, the court in the Milwaukee Case had no difficulty in rejecting the idea which under other circumstances found place in Blount v. Janesville, 31 Wis. 648,—that repairing cannot be considered as including paving or repaving. So it must be considered that the ruling thought of numerous decisions which may be found, some of which are cited to our attention, that an ordinance requirement of a street car company to keep its railway zone in "a good" or a "proper" "state of repair," does not under any circumstances, include paving or re-paving, has been rejected here and the one adopted supported by much, and, as said in the cited case, the better authority, that where the proper conditions of a street, under all the circumstances, require paving or repaving, the requirement to repair may be phrased in such a way as to cover the matter. The court adopted, as a principle for guidance in this state, the doctrine deduced by Judge Elliott in his work on Roads & Streets (3d Ed.) at §§ 987, 988, from many authorities on the subject, after giving due consideration, as was thought to those conflicting therewith, which may be epitomized thus: Where the franchise granted to build, maintain and operate a street car system contains an express requirement to repair, it continues with the life of the grant, creating a duty of such performance as will make that portion of the tract to which it relates conform to the changes
253 outside thereof, made from time to time under the direction of the municipality in order to render the way suitable for public use, and such performance includes, in making repairs after repaving by the municipality with the same material as before, and re-paving by substitution of a different material to conform to this changed condition as well.

Now why does not that rule with the supporting authorities referred to, go to the full extent of including the circumstances of this

case, as counsel for respondent claim? It certainly effectually excludes from our consideration the inconsistent theory, mainly relied on by counsel for appellant and supported by very respectable authority, that a requirement to repair does not include construction, or re-construction of a pavement. The facts of the case, as found by the trial court fall very clearly within that rule.

Here there was the express requirement to repair, emphasized by the word "proper": and we must not overlook the significance of that word. There was, in the beginning, a pavement which could not have been reasonably expected to be other than temporary, then came the time of need, in order to put the street in a proper state of repair, to remove the old worn-out pavement and put one in its place which would be suitable to the changed conditions. The common council acted within its power in providing for such pavement, and then ordered defendant to conform thereto.

True, in the Milwaukee Case, the principle was not carried so far as would be necessary for the purposes of this case, because the franchise there expressly required the railway company, in making repairs from time to time, to use the "same material as the city shall have last used to pave or repair. * * * previous to such repairs," in the absence of an agreement to use some other material. But when the court, upon due consideration, lays down a principle as controlling within a particular field and then applies it to a concrete situation in hand, it is not limited, as to the future, by the scope of that particular situation. If that were so, we would have a system of mere case law and no light dependable for the solution of problems as they arise, except that radiating from precedents. We have no such system, in fact, there is so much of habit to ground current decisions on what has been held as to the same or similar situations, by some court, or courts, somewhere, and on what particular justices have said, discoursing on matters before them in approaching and rounding a finality, that by laymen, quite commonly, and by some professional men and even courts, precedents are supposed to be the able and dependable guides, whereas they are, generally, merely object lessons illustrative of the application of principles. So we must regard the doctrine, unqualifiedly adopted in the Milwaukee case, to have been incorporated in the unwritten law of this state and test this case thereby, not by the mere facts of the former.

The scope of the principle adopted, as indicated, needs no extensive discussion. It was stated in unmistakable language by the Chief Justice in that case. It was supported by much authority, elementary and judicial. It is in harmony with the conditions of modern life. It is a natural development therefrom in the progressive spirit which does and should expand the zone of duty so as to meet, efficiently, the needs of changed conditions. It is in that way that the unwritten law, made up of principles rather than of mere precedents, does not and cannot, properly, stand still. It is a thing of growth and in that growth,—supplementing and reading out of the written law, what it speaks in the light of the circumstances of its origin,—and progressive conditions giving rise to new duties or to

the increase of old ones, are so dealt with as to conserve the public welfare.

254 The full scope of the rule announced in the Milwaukee Case may be best appreciated by reference to the illustration there given by quoting with approval from Mayor, etc., v. H. B. M. F. Ry. Co., 186 N. Y. 304, 78 N. E. 1072, this language:

"The question of what shall constitute keeping the pavement in the tracks of a railway company in good order and repair is to be determined somewhat at least by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had, for sufficient reason, decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition, and which was entirely different from that adopted in the remainder of the street."

The New York court before had and since has applied that principle to situations similar to the one in hand, and likewise the courts of Indiana, Florida and other states. The doctrine has taken on such dignity as to be recognized and adopted in standard elementary works, as indicated by the citations in the Milwaukee Case which need not be recited here nor added t The principle itself having become firmly established and the lo of it being well grounded, it would be sufficient to merely state as to any situation falling within it.

Before leaving the subject above discussed it might be well to recognize the fact, as contended in the brief of respondent's counsel, that the principle adopted by this court in the Milwaukee Case comes far short of the one adopted in some jurisdictions. There it is held that, because of the practical surrender of the street within the railway zone to the use of the street railway company, and the practical difficulties of divided responsibility for the physical condition of such zone, the common law and statutory duty of the municipality as to such conditions passes with the franchise, subject to responsibility of the municipality to the public for performance; that it is obligatory on the holder of the franchise to comply with all reasonable regulations of the grantor in respect to paving and repaving of the streets and keeping them in a proper state of repair within the railway zone, without any conditions in the charter in that regard. Reading v. Union Traction Co., 202 Pa. 571, 52 Atl. 106; Reading v. United Traction Co., 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380.

In the first case cited the court after reviewing its own decision remarked:

"When, looking beyond the decisions referred to, we search for principles to guide us to a conclusion, we find first of all that it is recognized, with substantial unanimity, that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect."

In a later decision there is evidence that the court was not disposed

to adhere to the broad rule announced, but in a still later decision the doctrine announced in the earlier case was re-affirmed.

"In that case, in affirming the judgment below, we adopted, correctly expressive of our views, the words of the present learned trial judge, that 'it recognized, with substantial unanimity, that a railway company whether general or passenger, is bound to keep the portions of the streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect.'"

We do not need to go that far at this time and, without expressing any disapproval thereof, but rather confessing a feeling of
255 force from the logic, we will rest the subject with the principle established in the Milwaukee Case.

Here we have a franchise with a provision as before indicated well within such principle. It requires the grantee thereof, at all times, to keep its railway zone in "proper repair so as not to interfere with travel over the same and keep the same in proper order and cleanliness at its own expense," language quite similar to that dealt with in Conway v. City of Rochester, 157 N. Y. 33, 51 N. E. 395, Village of Mechanicsville v. Stillwater, etc., Ry. Co., 174 N. Y. 507, 66 N. E. 1117, Binninger v. City of New York, 177 N. Y. 199, 69 N. E. 390, and Mayor, etc., v. H. B. M. F. R. Co., 186 N. Y. 304, 78 N. E. 1072, as for illustration: "The said grantees or their successors shall keep the surface of the street inside the rails and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the corporation." Here the franchise contains a quite similar provision as regards conforming the level of the railway zone to the grade of the streets and preserving such conformity. It was held that, in view of the object of such a requirement, it imposed a duty to comply with all reasonable regulations of the municipality as regards changing the character of the surface within the railway zone so as to harmonize with the rest of the street, and to the extent of putting down a new and better pavement whenever in the judgment of the municipality the public welfare required it. The great principle there declared is that, in the granting of such long franchises as the one in question, it must be presumed that a mutual intention existed that the grantee should not operate so as to obstruct the efforts of the authorities in their wisdom, to maintain the streets up to any reasonable standard required in order to keep abreast of the times and afford the public the use of ways, in harmony with progressive demands growing out of increase of population, increase of use, and improvements demonstrated by experience to be reasonably required to make such ways adaptable to changed conditions. That is what this court, in effect, said in the Milwaukee Case and it is now reaffirmed. The facts found by the trial court, as indicated in the statement, as to the necessity for substitution of a new pavement for the old one in order to put the street in a proper condition of repair, make a very clear case for the application of such principle.

If the foregoing discussion were not decisive of what the result should be here, there is another phase of the matter which the ma-

jority are of the opinion rules the case in favor of the respondent. I am firmly convinced, after a most careful study of the subject that there is little or no room for logical escape from that conclusion and that it has more of an unanswerable basis to rest upon, if there be room for degrees in the matter, than the one that paving and repaving is included within the obligation of appellant to "keep the space between the rails of each track and for the space of one foot outside in proper repair," etc. I say this without intending to cast any doubt upon the soundness of the latter ground for the decision here to rest upon. I am well satisfied with it upon principle and authority, though I recognize, as was done in State, etc., v. M. E. R. & L. Co., supra, that the contrary view has much and distinguished support. Kansas City v. Corrigan Cons. St. Ry. Co., 86 Mo. 67; 256 Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594; Norristown v. Norristown Pass. Ry. Co., 9 Pa. Co. Ct. R. 98; Norristown v. Citizens' Pass. Ry. Co., 9 Pa. Co. Ct. R. 102; Norristown v. Norristown Pass. Ry. Co., 148 Pa. 87, 23 Atl. 1062; Booth St. Ry. Law (2d Ed.) §243. The subject being one on which there is so much conflict of authority, and the case in hand having some circumstances which might be claimed to require an extension of the principle upon which the decision in the Milwaukee Case was grounded, it has seemed to me that if there are other circumstances, affording a firm and entirely independent basis for a decision the court ought not to pass it by.

The second ground for affirmance to which I have alluded, though after due consideration approved by the majority of the members of the court as sound, may not be as unqualifiedly endorsed as I assert its conclusiveness, so the high degree of satisfaction with it which I express may be, as the manner of supporting it will indicate, somewhat personal.

I may say, in passing, that the Chief Justice does not desire to express any opinion on the point I am about to discuss while Justice Barnes is in favor of a reversal. In that situation, especially, in view of the conflict of authority on the first point, it has seemed to me not only proper, but a duty to support such an important decision as the one we have reached by all the sound bases which are apparent. My Brethren who concur with me on the second point agree as to the propriety of supporting the decision thereby, if they do not go so far as to share in my view as to the duty to do so.

[16-18.] The new ordinance, as before indicated, was granted upon the express condition of its being subject to all general provisions of statute law now in force and applicable thereto and such reasonable rules and "regulations respecting the streets and highways as such council may from time to time enact." That is very comprehensive. It must be viewed, in the light of what has been said, as having been made a condition of the grant for the purpose, in the words of the opinion in the Milwaukee Case, of serving and conserving public advantages which are valuable and substantial rather than trifling and inconsiderate. "All the intendments must logically be favorable rather than adverse to the public." Language which is "equally capable of two constructions, that construction

which would safeguard the public interests, substantially, must be given preference to that construction which secures only insufficient or unsubstantial advantages to the public."

In short, any uncertainty of meaning in such a case must be resolved in a manner most favorable to the public, if such manner would be within the realms of reason, under all circumstances.

The term "rules and regulations respecting the streets and highways" does not mean merely "rules and regulations" as regards operation of cars, because "rules and regulations" in that regard are mentioned, conjunctively, in connection with "rules and regulations" respecting "such streets and highways." It seems that the latter must be construed to include "rules and regulations regarding the physical condition of the railway zone. It may well have been thought that such a provision, broadly considered, would impose a much more comprehensive duty upon the railway company than the one regarding paving, as provided in the old franchise,—that the brother provision would better conserve the public interests than the old one.

In view of the duty of the common council to carefully and vigilantly guard public rights, it seems quite likely that the new provision was added for the purpose suggested. It harmonizes with the provision respecting "proper repair," with the general idea as to the duty of a railway company in respect to that part of the
257 street within the railway zone and the importance of there not being divided responsibility as to operations which might otherwise interfere with its physical conditions.

The term "regulation" has often been said to be one of very broad import. Power in that regard extends to requiring changes in physical condition as well as manner of use. No court has taken a broader view in that than this court. C., M. & St. P. Ry. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; Eastern Wis. R. & L. Co. v. Hackett, 135 Wis. 464, 474, 115 N. W. 376, 1136, 1139; Chi., M. & St. P. Ry. Co. v. Village of Fair Oaks, 140 Wis. 334, 122 N. W. 810. It includes the power to widen, alter and extend streets so as to provide for the public convenience. U. S. v. Harris, 26 Fed. Cas. 185, 193. Also to granting the use of part of a street, and the exclusive use, under some circumstances; City of St. Louis v. Western U. T. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810 and to authorizing or requiring physical changes. McWethy v. Aurora El. L. & P. Co., 202 Ill. 218, 67 N. E. 9; State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515. The power to regulate is so broad that it includes power to prohibit under some circumstances. Att'y Gen. v. City of Boston et al., 142 Mass. 209, 7 N. E. 722. The term being thus broad, does it not include power to prescribe a condition of use such as to repave? In Fielders v. North Jersey St. R. Co., 68 N. J. Law 343, 53 Atl. 404, 54 Atl. 822, 59 L. R. A. 455, 96 Am. St. Rep. 552, the question was whether the general police authority of a city to regulate the use of its streets included power to require a street railway company to repave within the zone of its tracks in case of that being necessary. The nine members of the court, by one

majority, decided in the negative, the affirmative being maintained in a very vigorous dissenting opinion. As I read the opinions I cannot doubt that if the court had been dealing with an express condition, in this case, having the appearance of being a substitute for one in a previous franchise on the subject of paving, the decision would have been unanimous in favor of the idea here maintained.

"To regulate is to govern by, or subject to, certain rules or restrictions. It implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted." City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659. The principle thus applied is familiar. It is this: In case of a municipal power of regulation, either of a general nature over a particular subject or of a particular nature, as here, where it is a condition of the grant and the power exists for the conservation of public safety, convenience and welfare, any ordinance under it which is reasonable and in compliance with its purpose, is lawful.

Many more illustrations of the comprehensive meaning of the word "regulate" in situations somewhat similar to that in hand might be mentioned. Probably no better illustration could be given than to point to the history of the subject found in the many decisions of the federal courts on the power of regulation of interstate commerce. They have gone so far that it is very difficult to suggest limitations and the decisions are so familiar that citations seem unnecessary. As to the general scope, City of St. Louis v. Western U. T. Co., supra, is sufficient. The court there said of the word "regulate": It "is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to use the streets" as in the ordinance "it simply regulates the use which it prescribes
258 the terms and conditions upon which they shall be used." That has been many times referred to in the federal and other courts and significantly in Baltimore v. Baltimore Trust Co., 166 U. S. 673, 17 Sup. Ct. 693, 41 L. Ed. 1160, where the court added: "This power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the council may think proper; the use of the street may be subject to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously."

It is interesting to observe how the ordinary meaning of the term under consideration has been broadened in judicial conception by the manner of its use. In City of Owensboro v. Cumberland T. & T. Co., 174 Fed. 739, 750, 99 C. C. A. 1, 12, it was said: "What power is delegated by the express power to 'regulate' the streets and alleys

of a city? Manifestly, something was meant by the power to 'regulate.' The word 'regulate' imports power to control the use of the streets, and is indeed a power of wider import than 'control' or the power to 'consent' to an easement of way."

Holding to the broad meaning suggested, there are many circumstances of imposition of burdens upon railway companies, telegraph companies, telephone companies and persons possessing franchises for conducting public utility business, as a condition of using streets. Such impositions when thought to be within reason and for regulation instead of revenue, having been uniformly upheld. With that idea railroads have been compelled to abolish grade crossings in cities by lowering or raising tracks, and to pay the expense of constructing and keeping in repair and reconstructing crossings regardless of any conditions in their charters expressly so requiring. This court took advanced views on that in C., M. & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418, 72 N. W. 1118, which has been many times followed and approved as a leading authority. There this court discussed, at considerable length, the conflict of authority as regards the right of a municipality to burden, under the police authority to regulate, a railway company, using to any extent a public way, with the expense of constructions reasonably required, in the public interests. It was shown that the broad power of regulation, so hard to define definitely but so extensive in fact, having no limitations except legitimacy of purpose and reasonableness of means, had been lost sight of by many courts,—resulting in matters within it being treated from the standpoint of whether they were not breaches of contract rights. It had been overlooked, as was thought, that a municipality cannot materially, if at all, contract away its police power; that if it should attempt to do so the attempt would be futile. That being so, how much the power is signified, so to speak, emphasized, where, in the franchise grant, as in this case, the privilege is made expressly dependable upon observance of "all such reasonable regulations of the streets and highways as the council may see fit from time to time to enact."

In Eastern Wis. R. & L. Co. v. Hackett, supra, an ordinance of the city of Oshkosh was challenged as violative of the railway company's franchise contract rights. The ordinance required the railway company to make important and expensive physical changes at its own expense. The court, speaking by Mr. Justice Timlin, held that the acts of the city were well within its power of regulation which was not impaired by anything contained in the street car franchise, but rather confirmed thereby, and, particularly, referred to section 1862, Stats. 1898, declaring that a street railway company shall be "subject to such reasonable rules and regulations * * * as the proper municipal authorities may by ordinance from time to time prescribe," and also referred to C., M. & St. P. Ry. Co. v. City of Milwaukee, 97 Wis. 418, 72 N. W. 1118. We should note, in passing, that the general statute, thus given efficiency in the Oshkosh Case, quite as logically applies here,—especially, since the conditions of the grant expressly re-

quired subserviency "to all general provisions of statute law now in force and applicable."

Now can there be any doubt but that, even without special authorization to municipalities in granting the use of streets within their limits for street railway purposes to impose reasonable conditions as to regulation that they commonly exercise such power and make grants in that regard upon condition as to repair and also paving and repaving within the railway zone. All such conditions which are reasonable and imposed for regulation, as distinguished from revenue purposes, have been sustained. It must be conceded that the requirement to pave in the old ordinance, was matter of regulation. It might have been, and probably was, made a condition of the new grant as matter of regulation rather than matter of contract. If such a provision is within the power of reasonable regulation in case of an original grant, and of that there can be little or no doubt, when did the city of Madison lose that power?

If it could fairly be said that all not within reasonable requirements for public safety, in such a case, may be parted with by contract, or is so parted with in case of a grant without specific reservations covering the subject, State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515,—here there was such reservation ex industria and most emphatically made by the direct reference to existing statute law, and making subserviency thereto and to municipal requirements thereunder and the provision in the language of the statute a condition of the grant.

Was it for any mere narrow purpose conserving public safety in a field unquestionably covered by the police power, that the significant new provision was made a part of the ordinance? Does it not seem clear that the purpose was, in addition to ordinary police authority, to retain power to make regulative requirements within the broader field of police power and perhaps beyond,—power to make such reasonable requirements from time to time as changed conditions might render necessary in the interest of public welfare, whether technically within the field of ordinary police regulations or not. For things within such ordinary field no reservation of authority was needed. Nothing in the grant did or could impair it even to the extent of even involving it in doubt.

Must we not then, logically, conclude that the whole new condition in the ordinance was embodied therein for a very considerate and important special purpose. It could not have had reference to mere operation of cars on the road because, as we have seen, that was specially and separately provided for. What could the parties to the grant have had reference to except things in the broad and most comprehensive field of regulation,—such things as gave rise to this litigation? What possible justification or excuse was there for omitting to incorporate into the new grant the provision of the old one on the subject of paving, except that it was matter of reasonable regulation of the streets and highways in the broad sense of
260 section 1862 aforesaid and certainly covered by the express conditions of the grant, especially in connection with the

duty as to "proper repair." The mere specific duty was dropped out and a broad condition was substituted embodying the statute affording the municipality the stronger position.

The foregoing gives much significance to the manner of municipal proceedings in respect to the particular pavement. It did not, merely, notify appellant to put the street in "proper repair" as if seeking to arouse defendant's duty in that regard. It adopted, in the most formal way, an ordinance, in effect, ordering appellant to make the improvement. That pretty clearly was thought to be warranted by the condition of the franchise making it dependable upon conforming, in respect to the streets and highways, to "such reasonable rules and regulations" in respect thereto "as the said council may from time to time enact." If the particular condition has reference to physical conditions within the railway zone,—of which I am convinced, and the members of the court except as aforesaid are constrained to believe,—in view of the findings of fact, it probably would be conceded by all that the particular regulation is reasonable.

Up to this point we have discussed the second ground requiring affirmance as an original matter. But need it be so considered? It seems that section 1862 of the Statutes was overlooked below and here. Why so when its significance in view of the principle at stake was passed upon in State ex rel. Atty. Gen. v. City of Madison, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771, in respect to the original charter of appellant? It was there contended, in an original action in this court to annul the company's franchise, that its failures to comply with municipal requirements were, at most, mere breaches of contract; but the court held that they were breaches of the conditions upon which the grant was made and held that section 1862 of the Statutes was in itself a sufficient answer to all the company's contentions. The spirit of the decision is that such statute is a part of such a franchise and contemplates that the municipality shall have the broad continuing power of regulation, enabling it to deal with conditions as they may exist from time to time. The significant language of the statute was specially referred to "subject to such reasonable rules and regulations as the proper municipal authorities may by ordinance from time to time prescribe." The idea of the lawmakers is that the broad power is not subject to exhaustion or limitation by any specific requirement in the grant. Note the words "from time to time," showing the legislative idea was that changed conditions, within the life of such a franchise will be quite likely to require physical and other changes in the manner of using the streets which could not be foreseen and particularly provided for in advance. The litigation, in which the decision referred to was made, terminated a short time before the common council of the city of Madison came to deal with the matter of the substitute ordinance. It was doubtless fresh in the minds of its members and they gave such dignity to section 1862, in connection with the proper repair provision, as to suppose nothing more to be needed; so the special provision on the subject of paving was omitted and the new one added, giving special prominence to the statute by the words

"subject to all general provisions of statute law now in force and applicable thereto" so recently passed upon and given the broad comprehensive meaning indicated, followed by substantially the very language of the statute. This history gives striking significance to the circumstance that the requirement in this case was made by a formal ordinance following the terms of the statute and the franchise as well.

Judgment is affirmed.

Siebecker, J., took no part.

261 STATE OF WISCONSIN:

In Supreme Court, August Calendar, 1913.

No. 205.

CITY OF MADISON, Respondent,
vs.
SOUTHERN WISCONSIN RAILWAY COMPANY, Appellant.

BARNES, J. (dissenting):

It is pointed out in the Milwaukee Case, 151 Wis. 520, 529, 139 N. W. 396, that the weight of authority is to the effect that an obligation imposed on a street railroad company to keep the portion of the streets between and adjacent to its tracks in a proper state of repair does not impose the duty of repaving. Some stress is laid on the fact that the duty imposed was not simply to repair the pavement, but to "keep and maintain in good and thorough repair during the continuance of said term" a certain portion of the street. In the case before us for decision now the street railway company is required to keep the street in "proper repair." It was held in the Milwaukee Case that the language of the ordinance was broad enough to include repaving if the parties intended that it should be included, and, there being doubt about what the intent was, it was held that the ordinance should be construed strictly against the railway company and liberally toward the public. Proceeding on this line of reasoning the court decided that the street railway company was bound to repave. Were it not for the ordinance granted defendant's predecessor in 1884, I should find no difficulty in saying that the decision in the Milwaukee Case should govern the present one.

It must be conceded (1) that the ordinance before us does not by express language cover repaving; (2) that the majority of courts hold that it does not do so by implication; and (3) that the ordinance being ambiguous must be construed so as to carry out the intention of the parties, if that intention can be ascertained with reasonable certainty. There is no question of private or public consideration that can ever justify a court in placing a construction on an ambiguous contract known to be one that defeats the intention of the parties thereto, and neither is there any justification for construing

an ambiguous act of the Legislature or of a common council so as to defeat the intent of the legislative body, if that intent is manifest.

To my way of thinking it is perfectly clear that the parties to this franchise did not intend to impose the cost of repaving on the railway company. The council when it adopted the 1884 franchise had clearly in mind that the obligation to repair did not or might not include that of repaving. Section 2 of that ordinance covered repairing and was literally copied into the ordinance of 1892. Section 3 of the 1884 ordinance expressly and definitely covered the matter of repaving. This was entirely omitted from the ordinance of 1892 and was repealed by it. So we have a case where the council had before it an existing ordinance which required both repairing and repaving to be done, and where it repealed the section imposing the duty to repave and re-enacted the one which im-
262 posed the duty to repair, and yet it is said that it intended to impose both duties on the defendant. I can well see how a council might ordinarily think that the duty to repair included the duty to repave. But where the ordinance which was about to be superseded and repealed specifically imposed both duties, it is inconceivable that, if it was intended to impose both by the new ordinance, the part of the old which provided for one of them should be actually repealed. The attention of the council was sharply called to the fact that repairing and repaving were two different things. The ratiocination by which the conclusion is reached that the council of 1892 was guilty of gross negligence, if not something worse, unless it was intended to impose the duty to repave, seems to me to be passing strange. Within their delegated powers common councils can grant such franchises as they see fit. It is a perfectly harmless occupation if no one is willing to accept the thing granted. Franchises are essentially contracts, generally arrived at as the result of mutual concessions. In all probability the defendant was not in as prosperous a condition 21 years ago as it is now. It was then operating cars propelled by horse power. The city no doubt desired rapid transit, and the principal purpose of the 1892 ordinance was to permit the street railway company to electrify its lines. There was plenty of consideration for relieving it from the burden of repaving, and it would be assuming altogether too much to say that such relief was granted because the council was either incompetent or dishonest.

The right to lay tracks in the streets was granted subject "to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact." I do not conceive that this general provision covers anything aside from the manner in which the streets should be used and in which cars should be operated therein. It seems to me to be far-fetched to say that the reservation of the right to pass the rule or regulation referred to comprehended the right to compel the construction of a part of a street. If a part, why not the whole? If the whole, then an easy way has been discovered to relieve the city from the expense of street building along the line of defendant's road. I confess that I am too dense to see how the right to pass a rule or regu-

lation respecting a street gives authority to compel a user to build it. The city having by express provision in the franchise specified what the defendant was required to do in the way of repairing streets, and having repealed the provision of the old ordinance in regard to the repaving, it is perfectly manifest that the general provision above quoted was not intended to cover repairing or repaving.

263 STATE OF WISCONSIN:

In Supreme Court.

SOUTHERN WISCONSIN RAILWAY COMPANY, Plaintiff in Error,
vs.
CITY OF MADISON, Defendant in Error.

I, Clarence Kellogg, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, except such papers as are omitted pursuant to the stipulation of the parties herein.

That the original writ of error, the petition therefor, and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgement, and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this First day of October, A. D. 1914.

[Seal Supreme Court of Wisconsin.]

CLARENCE KELLOGG,
Clerk of Supreme Court of Wisconsin.

Endorsed on cover: File No. 24,397. Wisconsin Supreme Court. Term No. 260. Southern Wisconsin Railway Company, Plaintiff in error, vs. City of Madison. Filed October 12th, 1914. File No. 24,397.

Supreme Court, U. S.
FILED
FEB 21 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted] 260

SOUTHERN WISCONSIN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF MADISON, DEFENDANT IN ERROR.

BRIEF OF ARGUMENT OF PLAINTIFF IN ERROR

BURR W. JONES AND
E. J. B. SCHUBRING,
Attorneys for Southern Wisconsin Railway Company,
Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 653.

SOUTHERN WISCONSIN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF MADISON, DEFENDANT IN ERROR.

BRIEF OF ARGUMENT OF PLAINTIFF IN ERROR

BURR W. JONES and
E. J. B. SCHUBRING,
Attorneys for Southern Wisconsin Railway Company,
Plaintiff in Error.

NATURE OF ACTION AND STATEMENT OF CASE.

This is a writ of error from a judgment entered in the supreme court of the state of Wisconsin in favor of the plaintiff, the city of Madison, and against the defendant, affirming the judgment of the circuit court for Dane county for the sum of $4,567.64. The action was instituted by the city of Madison for the purpose of recovering of the plaintiff in error the cost of asphalt pavement between the rails and one foot on the outside thereof of defendant's track on University avenue between Park street and Charter street, for which it is claimed plaintiff in error is liable under the terms of its franchise from the city and an ordinance passed by the city requiring the paving of part of the street with asphalt.

The company denied all liability and by stipulation of the parties the city put in the pavement pending the determination of the rights of the parties by the court.

The Defendant in Error is a municipal corporation. The Plaintiff in Error is a public service corporation operating a street railway system in the city of Madison under a franchise granted June 10, 1892.

On March 8, 1884, the city of Madison granted a franchise to Madison Street Railway Company which was on Feb. 26, 1889, confirmed by the Madison City Railway Company. Under this franchise a horse street car system was operated on certain streets in the city including the portion of University avenue in question.

On June 10, 1892, the franchise under which the company is now operating was granted. This later franchise provided for an electric street railway system and contained the following repealing clause: "All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

The franchise of 1884 was bodily incorporated with a few modifications into the franchise of 1892 with one notable exception, namely, that part of section 3 of the franchise of 1884 which related to the paving and macadamizing by the Street Railway Company of the street between its rails and one foot on the outside thereof, which was eliminated.

University Avenue is one of the widest streets in the city; the width between the lot lines is 99 feet and the paved portion of the street between curb lines is 66 feet (Transcript, p. 42). The defendant company maintained a single line of railway in the center of the street. (Transcript, p. 44.)

University Avenue extends in a northwesterly direction to the city limits and beyond, and is the principal street leading in to the city from the northwest. It is a much traveled street and is used by teamsters hauling stone from the quarries and brick yard situated to the west of the city. (Transcript, 43.)

Up to the time of the ordering of the asphalt pavement on University Avenue macadam had been the recognized method of improving streets in the city. (Transcript, p. 57.) The eight blocks around the capitol square were the only streets paved with asphalt up to that time. (Transcript, p. 56.)

University Avenue had not been improved at the expense of abutting property owners prior to 1910. Such repairing as had been done by the city was done with crushed rock and a portion of the street had stone gutters. (Transcript, pp. 42, 43.)

In 1906 the defendant had relayed its track from Park street to Mills street, and in 1908 from Mills street to Charter street and beyond. The ties were laid on crushed stone and crushed stone was placed above the ties and between the rails. (Transcript, pp. 45, 137.)

The railway zone was the best portion of the street, and much of the travel on the avenue was along and over the railway zone. (Transcript, 139.)

The city had served no notice on the defendant company that the railway zone was out of repair nor made any request that the same be repaired. (Transcript, 139, 140.)

The railway company was at all times ready, willing and able to keep the railway zone in repair as required by the franchise. (Transcript, 140, 141.)

It is feasible and practicable to keep the railway zone of macadam and pave the rest of the avenue with asphalt. (Transcript, 50, 52.)

The railway zone if of macadam could be kept in such repair as to offer no obstruction whatever to vehicles crossing the railway strip. (Transcript 62, 63.)

The width of University Avenue is such that the heavy traffic would travel along the asphalt pavement and not on the railway zone, and thus there would be much less wear on the macadam pavement within the railway zone. (Transcript, 65, 111.)

In 1880 the population of the city of Madison was 10,324 and in 1890 it was 13,426. (Transcript, 144.)

In 1892 when the franchise of that year was granted the Railway Company was operating a horse car system. Upon the acceptance by it of the franchise of 1892 the company installed an electric street railway system which was the only system which could be operated under that franchise.

The change from one system to the other imposed a heavy burden on the company which was not taken care of by increased traffic, so that in 1894 a receiver for the company was appointed. (Transcript, 143.)

Prior to June 10, 1910, the city determined to improve University Avenue with asphalt pavement of the best material and construction (Complaint of Defendant in Error, Transcript, p. 27) and according to elaborate plans (Transcript, p. 146) and passed an ordinance ordering the company to improve the portion of University Avenue in question between its rails and one foot on the outside theref. (Transcript, p. 28.) The company refused to comply. At about the same time the city entered into a contract with the Andrews Asphalt Paving Company for the pavement of University Avenue, except the portion thereof lying between the rails and one foot on the outside thereof of the defendant. (Transcript, p. 28.)

The ordinance recited that the contract had already been let and the Company was ordered to complete the work not later than Oct. 15, 1910, and in case of neglect to comply with the ordinance the Company was made liable to a fine or penalty not exceeding $50 per day for each day of such neglect. (Transcript, p. 28–29.)

Thereafter and on August 20, 1910, the plaintiff and defendant entered into a stipulation (Transcript, 29) whereby it was agreed that

the city should pave the street between the rails and one foot on the outside thereof and the question of who should pay for this improvement should be determined by the courts, including the Supreme Court of the United States. (Transcript, p. 30.)

The work was thereafter performed by the city at the price of $3,912.24 for which the defendant in error instituted this action. Plaintiff in error denies that it is under obligations to pay for this asphalt paving.

The Circuit Judge in the State Court found among other things that the track was out of repair at the time of the passage of the asphalt ordinance. The Court also found:

> "That macadam formed of the crushed stone *used by the defendant on its tracks* on University Avenue is not a proper pavement for a street having as heavy traffic as University Avenue; that such macadam rapidly wears down under heavy traffic, causing depressions in the space occupied by the tracks, which would interfere with travel over the same from an asphalt pavement on either side; that traffic over such depressions would injure the asphalt on either side of the railway zone, and that in warm weather small particles of crushed stone would be carried upon the asphalt when soft and cause permanent injury to the same." (Transcript, p. 37.)

And that the City was entitled to judgment for the amount claimed.

The Supreme Court of the State affirmed the judgment.

It was decided that the franchise ordinance of 1892 repealed that of 1884. (Transcript, p. 160.)

It was also held that when the ordinance of June 10, 1910, was adopted ordering the asphalt pavement there was no express requirement in the franchise on the subject, and that

> "If there was an authority to impose such a burden it must be found in some duty independently of written law, or read out of the general spirit of the franchise by construction, or the particular clause in respect to 'proper repair' or found in the particular conditions upon which the rights of the grantee were made dependable." (Transcript, p. 160.)

Assignment of Errors.

The Supreme Court of the State of Wisconsin erred:

(1) In holding that the city had the power by the ordinance of 1910 to impose the burden of asphalt paving independently of the written law or by reason of the general spirit of the franchise by construction or from the clause in respect to proper repair or by reason of the particular conditions upon which the rights of the grantee were made dependable. (Transcript, p. 160.)

(2) In holding that the ordinance of 1892 should have such a construction as would avoid the result or conclusion that the common council had grossly failed to perform its duty. (Transcript, 112.)

(3) The Court erred in holding that the provision in the franchise that the grantee should keep its railway zone in "proper repair required the Company to reconstruct and pave the strip with asphalt." (Transcript, p. 165.)

(4) In view of the plain provision of the franchise, the Court erred in holding that it should be presumed that it was the intention of the franchise that the Company should pave with asphalt if so ordered. (Transcript, p. 165.)

(5) The Court erred in holding that the right reserved to the city to make such reasonable rules and regulations respecting the streets and highways as the council might enact gave the power to compel by ordinance the paving with asphalt. (Transcript, pp. 166–167.)

(6) The Court erred in holding that Section 1862 R. S. Wisconsin authorized the adoption of the ordinances as to paving with asphalt. (Transcript, pp. 171–172.)

(7) The Court erred in holding that the ordinance of 1910 did not impair the obligation of the contract created by the franchise of 1892.

(8) The Court erred in holding that the ordinance of 1910 was not void as depriving the plaintiff in error of property without due process of law.

ARGUMENT.

I.

The Question of Jurisdiction.

Since it was held by this court that the motion to dismiss for want of jurisdiction should be argued at this time we are adding somewhat to the argument but without raising new questions.

For the convenience of the Court we will state the facts involved in several cases which were cited in our brief on the motion to dismiss.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142 was a case very similar to the one at bar. In this case the Gas Company was granted a charter in 1856. Sec. 9 of the charter provided that the Company, when the City of St. Paul shall by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the Company shall furnish, set up, and keep in repair, etc., all the posts, lamps, etc. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Co. an interest of eight per cent on the amount of the sum of the original cost of said street lamps, posts, etc. Either by the original charter or by amendment the Gas Co. was empowered to supply electricity as well as gas. After the erection of gas poles, electricity was in certain portions of the city substituted for gas. The Gas Company insisted on its right to recover interest on the gas poles which had been erected and then replaced by electricity. The city denied its liability, and as a result of the disagreement passed in 1897 an ordinance requiring the Gas Company to remove the gas poles which had been replaced by electricity, and also provided that after the passage of this ordinance no further interest should be paid on account of such gas poles.

The Gas Co. then commenced an action to recover the interest, and the above ordinance was set out in the complaint. The trial court decided in favor of the Gas Co. On appeal the Minnesota Supreme Court reversed the judgment. The Gas Company then took a writ of error to the United States Supreme Court. The decision of the State Court was that the City was not under the terms of the contract bound to pay for its gas poles which were not being used.

The United States Supreme Court took jurisdiction, but dismissed the case for want of jurisdiction on the ground that there was no impairment of the contract; that is, on the merits: *and not because no*

federal question was involved, and used the language quoted on page 5 of our brief on motion to dismiss.

In the *Houston case*, 177 U. S. 66, also cited in our brief on the motion to dismiss, the Railway Company was indebted to the state on certain bonds and this action was to foreclose. After the giving of the bonds the civil war broke out, and the Railway Companies could not meet their obligations. To meet this situation the legislature passed the Act of August 13, 1870, for the relief of railways, which act provided that if any company should on the first day of May, 1870, pay six months interest on the aggregate amount of the loan and one per cent of the principal on May 1, 1870, and should thereafter make similar semi-annual payments, the state would not exact other payments. Prior to this, in 1863, the legislature had passed an act allowing the railway company to pay in state treasury warrants. The railway continued to make the payments under the act until its indebtedness was paid. The question in controversy was the amount due May 1, 1870. This depends on the validity of certain payments made by treasury warrants.

After the passage of Act 1870 railway companies were recharged the amount they had paid in such warrants.

It was claimed that the Act of 1870 as construed by the state authorities, impaired the obligation of the contract existing between the state and itself.

The state court rendered judgment for the state on the ground that the warrants were issued in violation of the state constitution, as paper intended to circulate as money. It was admitted that if the payments by treasury warrants were duly credited, there was no default.

The court says at page 76:

> "When the state court, therefore, decided that these warrants were issued in violation of the constitution of the state, and that payments in them were in fact and in law no payments and gave judgment accordingly, the effect of that decision was necessarily to hold that the company had defaulted in respect to the payments required under the act, and that the proceedings of the state to collect the sum due were permitted by the act, and effect was thus given to such act, although not one word was used in regard to it in the opinion delivered in the state court.
>
> "If the Railway Company had not failed to pay any amount required to be paid in section one of the act, then the proceeding herein could not have been taken, by reason of the provision contained in the third section, and it is only after a failure to pay for ten days that the second section permits the proceedings to be taken to collect the amount. In giving judgment for the plaintiff, therefore, the court has in effect determined that the plaintiff was proceeding rightfully under the Act of 1870, and effect was thus given to its provisions."

And at page 77, the court says:

> "Thus we see that, although the decision of the state court was based upon the ground that the warrants in which these payments were made had been issued in utter violation of the state constitution, and were hence void, and that no payments made with such warrants had any validity, and altho this ground of invalidity was arrived at without any reference made to the Act of 1870, yet the necessary consequence of the judgment was that effect was thereby given to that act, and in a manner which the company has always claimed to be illegal and unwarranted by the act when properly construed. The Company has never accepted such a construction but on the contrary has always opposed it, and raised the question in this proceeding at the very outset. Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction, and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below.

See also quotation from this case in our brief on motion to dismiss page 11.

The Houston case is particularly applicable to this case. In the present case we have had from the start a disagreement as to the construction of the contract. The federal question was raised by the plaintiff in error in the trial court and maintained throughout the subsequent proceedings. The effect of the ordinance of 1910 was the main issue before the State Supreme Court. It was the passage of this ordinance which led to the stipulation between the city and the railway company, and was set out fully in the complaint. Transcript p. 29. The stipulation was for the purpose of avoiding the penalties under the ordinance until the effect of the ordinance could be determined and to permit the work to progress without delay to the city.

To enforce the completion of the work within the time limited in the ordinance burdensome penalties were imposed; all of which was done without the consent of the other contracting party.

The original action in the trial court was the outcome of the stipulation, which in turn was made necessary so as to avoid the burdensome penalties imposed by the ordinance. The real question raised by the defendant below was the effect of this ordinance. The action really grew out of it; and our State Supreme Court in giving judgment for the city did in fact hold against the Railway Company on the federal question raised and maintained by it. Our State Court by allowing the city to recover recognized the ordinance, the power of the City to enact it, the validity of the time provision and the penalty provision, which had never been consented to.

The effect of the judgment although apparently based on the construction of the franchise, was to give effect and life to the ordinance, just as much so as in the Houston case, supra.

Counsel for defendant in error contends that the only question involved is the construction of the contract. It would be more correct to say that the supreme court apparently based its decision on the question of construction. The fact is that the federal question was kept before the court from the making of the stipulation until the present time. The State Supreme Court cannot evade determining the federal question when it is before it, by apparently basing its decision on a question of general law.

In *Given v. Wright*, 117 U. S. 648 certain Indian lands had been exempt from taxation. The lands were then sold; but at the time there was no repeal of the tax exemption; although there was subsequently to the sale. There had been acquiescence in the payment of the taxes for a period of sixty years from the time of the act repealing the exemption. The question raised was impairment of the contract by subsequent legislation. The State Court held the exemption lost through acquiescence. The Court says at p. 655:

> "The question then, will be, whether the long acquiescence of the land owners under the imposition of taxes raises a presumption that the exemption which once existed, has been surrendered.
>
> This question, by itself, would be a mere question of state municipal law, and would not involve any appeal to the constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a state law, as in this case, by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairments by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded."

In West Chicago *R. R. Co. v. Chicago*, 201 U. S. 506, 519, the Court said:

> "The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the State from depriving any one of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or gen-

eral law would be error; for, the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in Chicago, Burlington & Quincy R. R. Co. v. Drainage Commissioners, 200 U. S. 561."

For a further illustration of what the U. S. Supreme Court means by giving effect to a statute see McCullough v. Virginia, 172 U. S. 102 at 117.

See also *Mercantile Trust Co. v. Collins, etc. Co.*, 99 Fed. 812, which cites and quotes from numerous cases of this court holding the same rule.

It is suggested by counsel for defendant in error that the ordinance ordering the paving and imposing penalties is a mere administrative and not a legislative ordinance, and the case of New Orleans vs. La. Sugar Co., 125 U. S. 18 is relied on for this point.

In this case the ordinance in question was a mere permission or license to lay certain pipes, and as stated in the opinion "the power conferred upon the city council might equally well have been vested in the mayor alone or in any other officer of the city." p. 32.

In discussing this case and this question Mr. McQuillan in his work on ordinances points out the distinction between an ordinance constituting a mere license and one legislative in its character.

McQuillan on Ordinances Sec. 233.

From his definition of administrative ordinances it is clear that the ordinance of 1910 ordering the laying of the asphalt pavement was not of that class.

McQuillan on Ordinances Sec. 233.

If an ordinance of this character involving the right to impose burdens which within a few years would amount to a hundred thousand dollars or more, and under which a penalty of fifty dollars per day might be incurred, is not legislative in its character, we submit that it would be difficult to name an ordinance which is.

It is also suggested by counsel for defendant in error that by the stipulation on which this action is brought the only question raised was as to the construction of the franchise of 1892. In view of the history of the stipulation and the litigation as appears from the pleadings this seems to us rather far fetched. The City cannot appeal to own jurisdiction to defeat Supreme Court decision Clinton Case 194 U.S.

Before the ordinance ordering the work and imposing penalties the question had been theoretical; when the penalties began to run it became very practical.

The words of the stipulation "under its franchise and the laws of Wisconsin" now relied on by counsel for defendant in error (brief on motion to dismiss p. 25) are broad enough to sustain our contention that the construction and effect of both ordinances were in issue, and that the question whether the last ordinances impaired the contract was the vital question.

Under the statutes, the franchise, the penalty ordinance, the stipulation and the pleadings, the Supreme Court could not have reached its conclusion, without holding that there was no impairment of the contracts by the penalty ordinance.

The Revised Statutes of Wisconsin with respect to ordinances and their effect was as follows:

Section 925i, Subdivision 52, Statutes 1898, Chapter 326.

> "The common council shall have the management and control of the finances and of all the property of the city, except as herein otherwise provided, and shall likewise in addition to all other powers herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such rules, by-laws and regulations for the government and good order of the city, for the benefit of the trade and commerce of the city, and health of the inhabitants thereof, for the prevention of crime, and for carrying into effect the powers vested in said council as they shall deem expedient; such council shall have power to declare and impose penalties and to enforce the same against any person or persons who may violate any of the provisions of such ordinances, rules, by-laws or regulations; *and such ordinances, rules, by-laws and regulations are hereby declared to be and have the force of law;* provided that they be not repugnant to the constitution of the United States or of this state, or of the laws thereof, and for the aforesaid purposes such common council shall have authority by ordinance, resolution, by-law or regulations."

In a long line of cases from Chicago v. Sheldon, 9 Wallace 50 to Atlantic C. L. Co. v. Goldsboro, 232 U. S. 548 it has been held that a "municipal by-law or ordinance enacted by virtue of power for that purpose delegated by the legislature of the state is a state law within the meaning of the federal constitution".

Atlantic C. L. Co. v. Goldsboro, 232 U. S. 548.

II.

The franchise of 1884 was repealed by that of 1892.

The repealing clause of the ordinance of 1892 was as follows:

> "SECTION 7. All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed."

The franchise of 1884 was bodily incorporated in almost identical language into the franchise of 1892 except for the significant omission of that part of Section 3 of the franchise of 1884 relating to repair and pavement. The franchise of 1892 therefore was a complete revision of the franchise of 1884 and by implication repealed that franchise.

Lewis v. Stout, 22 Wis. 234, 236.
Smith v. Eau Claire, 78 Wis. 457.
Stafford v. Chippewa Valley Electric Ry. Co., 110 Wis. 331, 350.
I Lewis Sutherland Statutory Const. 465.

> "It is a general rule in the construction of statutes, that a statute which revises the subject matter of a former statute, works a repeal of such former statute without express words to that effect."
>
> Lewis v. Stout, 22 Wis. 234, 236.

In the pending case the Supreme Court held that the former ordinance was repealed. (Transcript, p. 160.) This makes the further discussion of the subject unnecessary.

III.

The duty to repair and pave streets is on the city and can be shifted to the street railway company only by express provisions of the franchise.

At common law the duty to repair and repave streets rests upon the municipality.

Hammond v. Town of Mukwa, 40, Wis. 35, 41.
Platt v. City of Milwaukee, 53 Wis. 196, 201.

Obligation to repair or repave can therefore not rest upon the Plaintiff in Error unless such duty is expressly imposed by the franchise.

Chicago Union Traction Co. v. Case, 129 Ill. App. 451, 466.
Mayor v. Bleicker St. & Ferry R. Co., 115 N. Y. Supp. 592, 595.
Western Paving & Supply Co. v. Citizens Street Railway Co., 128 Ind. 522, 26 N. E. 188.

IV.

The Franchise of 1892 does not require the Company to pay the cost of pavement between its rails and one foot on the outside thereof, and the penalty ordinance and the decision of the Supreme Court impair the contract.

The real question involved in the writ of error is whether in view of the franchise of 1892 the penalty ordinance of 1910 impairs the contract and takes the property of the railway without due process of law.

We have pointed out in the portions of our brief relating to the question of jurisdiction, that this court should decide whether the franchise of 1892 admits of the construction placed upon it by the State Court in order to determine whether the contract has been violated. Our assignments of error point out the particulars in which we believe the court erred in its construction of the franchise statute and without following the exact order of the assignments in error we shall proceed to discuss this contract and to point out the errors we believe the court to have made, and attempt to show that by the operation of the penalty ordinance and the decision of the court the constitution of the United States was violated.

The language of the franchise relied on by defendant in error as imposing upon the plaintiff in error the duty to repave, and which in

connection with the ordinance of 1910 are claimed to authorize a recovery in this case is as follows:

> "Said Company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense." (Transcript, p. 24.)

This language, we contend, does not impose upon the Street Railway Company the duty to pave or repave the railway zone, but simply to keep the same in such repair *as not to interfere with travel over the same, and to keep the same in proper order and cleanliness.*

A. Intention of parties must prevail.

In the Milwaukee case, 151 Wis. 520, much relied on by the Court, the Supreme Court of Wisconsin based its decision upon the meaning of the provisions of the franchise involved in that case. In harmony with that decision we contend that the decision in this case should likewise be based upon a construction of the provisions of the franchise in issue with a view of ascertaining the true meaning and intent of such provisions. A correct principle of construction of course is that the words used must be given the meaning they had at the time the contract was entered into. In no other way can the meaning of the parties be ascertained. Any special meaning since acquired by any particular words then used cannot be considered to affect such meaning.

If the word "repair" for instance was used in a certain sense at the time the contract was entered into that sense, if plainly ascertainable, must prevail and cannot be superseded by some special meaning which it may since have acquired.

The purpose of the construction of the contract or franchise should be to give effect to the intention of the parties. No other method can be properly pursued without doing violence to the language of the franchise and to the contract relations between the parties.

When the franchise of 1892 was passed by the common council of the city of Madison and offered to the Street Railway Company that company was operating a horse car system under the franchise of 1884.

The provisions of the two franchises as to repair or repaving the railway zone are therefore of vital importance in ascertaining the intention of the parties in relation to that matter. The franchises of 1884 and of 1892 contained the following provisions in relation to repairing and repaving:

Franchise of 1892.

Section 3 (a) * * *

"Said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense."

Franchise of 1884.

Section 2. * * *

"Said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at its own cost and expense."

Section 3.

"Whenever any street upon which any of said tracks may be located shall hereafter be paved or macadamized, the said railway company shall pave or macadamize the roadbed between and one foot on either side on the outside of the rails of the track of their said road, and shall at all times make and keep the tracks between and one foot on either side on the outside of the rails thereof equally as good as the street shall be outside of their tracks, and shall correspond in surface and improvements with the said street outside of said track."

(Transcript, p. 19.)

The above comparison discloses that the provision in the franchise of 1892 now relied on by the city is substantially the identical provision contained in the franchise of 1884. The franchise of 1884, however, in addition to that provision has a further provision expressly and specifically providing for repaving and repairing, and imposes that burden upon the street railway company. This provision is omitted from the franchise of 1892. That such omission is significant cannot be doubted. That it omitted from the franchise of 1892 a burden which had been imposed by the franchise of 1884 is clear. It can not be reasonably contended that the parties to this franchise contract could have intended the language relied upon by the city to mean anything different in the franchise of 1892 than it meant in the franchise of 1884. It is not reasonable to suppose that the parties having both franchises before them could have intended the same words used

in the same connection to mean one thing in one franchise and an entirely different thing in the other franchise.

What then was the meaning of the provision now relied on by the city in the franchise of 1884. In that franchise that provision clearly could not have meant that the Street Railway Company should pave and re-pave the space between the rails and one foot on the outside thereof because that subject is expressly and specially provided for by a separate section of the franchise as the above comparison and quotation clearly show. The other provision of the franchise of 1884 which was incorporated into the franchise of 1892 and is relied on by the city clearly could not have meant the same thing as the provision of Section 3 above quoted.

The rules of construction of contracts or statutes require that each provision be given its own meaning if such meaning is reasonably ascertainable. Giving the language now relied on by the city its reasonable meaning in the franchise of 1884, it seems clear that it means just what it says, namely that the space between the rails and one foot on the outside thereof should be kept in repair "*so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness.*"

The subject considered by this section therefore was that relating to keeping the railway zone a part of the traveled portion of the street, and keeping it in a clean condition. The question of pavements and repavements was taken care of by the succeeding section. This construction gives a reasonable meaning to both provisions of the franchise of 1884.

In effect therefore the meaning of the provision of the franchise now relied on by the city is defined and explained in the franchise of 1884 to the extent at least that it excludes the idea of burdening the Street Railway Company with the cost of new pavements. That definition and that meaning we contend are binding upon the city and determine the meaning of the provision as it appears in the franchise of 1892.

The parties to this franchise contract acting as reasonable persons and having before them the provisions of the franchise of 1884, and the then proposed franchise of 1892 which we have quoted, must have understood that the elimination of that part of Section 3 of the franchise of 1884 above quoted from the franchise of 1892 meant something, and that it eliminated from the franchise of 1892 a burden which had been imposed upon the railway company in the franchise of 1884.

This omission in effect we contend amounts to an affirmative declaration on the part of the city that the Street Railway should not be required to repair, pave and repave, and the railway company had a right to assume that it was being relieved from that burden by the franchise then offered to it.

Smith v. City of Eau Claire, 78 Wis. 458, 462.

That such omission was considered significant by both parties and was an inducement offered by the city for the surrender of the franchise of 1884 and the acceptance of that of 1892 by the Street Railway Company, is clear from the facts and circumstances existing at the time the franchise of 1892 was passed and accepted.

In 1892 when the franchise of that year was passed by the City of Madison and offered to the Street Railway Company that Company was operating a horse car street railway system under the franchise of 1884, which was exclusive, and still had seventeen years to run. The City of Madison at that time was a small city. The census of 1890 had given it a population of 13,426, and that of 1880 a population of 10,324.

Under the franchise of 1892 only an electric street railway could be operated. The advantages to the City of Madison of a change from a horse car system to an electric street car system were apparent. It needs no argument to show that from the point of view of more efficient service, and greater convenience to the public, an electric street railway system was greatly to be preferred by the City of Madison. A horse-car system actually uses and wears out by such use with its horses and mules the portion of the street between the rails and makes that portion uncleanly. Its service is less dependable, less efficient and less speedy, and cannot offer as great conveniences to the public as an electric street railway system. The City of Madison therefore in securing a change from a horse car to an electric street car system was securing every advantage.

The situation from the point of view of the street railway company, however, was entirely different. A change from the horse car to the electric car system involved heavy financial burdens. It meant a scrapping of the equipment then had; it meant the building of a better roadbed, the installation of an expensive over-head system, the laying of heavier rails, and the purchase of expensive cars. The change from one system to the other in fact virtually meant a destruction of all of the property and equipment then owned by the street railway company and the building of an entirely new system.

In fact events soon disclosed that the company assumed a burden too heavy, for, within two years after the acceptance of the franchise the road went into the hands of a receiver. (Transcript pp. 143, 144.)

When the City of Madison therefore offered the Street Railway Company the franchise of 1892 it is fair to assume that some inducement for its acceptance had to be offered that Company. Business men acting reasonably in purely commercial transactions do not yield up valuable rights or assume financial burdens without some consideration.

There is no proof of any inducements offered the Street Railway Company for making the change from the horse car to the electric street car system except as such inducements appear in a more favorable franchise.

The franchise of 1884 was used as the basis for the franchise of 1892, being bodily incorporated into it with a few minor changes of words, and with the important change of increasing the life of the franchise from twenty-five to forty years, and with the significant omission of that provision of the franchise of 1884 heretofore quoted which had imposed upon the Street Railway Company the burden of paving and repaving, and keeping in repair the railway zone.

Is it reasonable to infer that the Street Railway Company in considering the advantages accruing to it by accepting the new franchise did not have a right to assume that this omission was significant, and that it was relieved from a burden which had been imposed upon it by the franchise of 1884? Is it reasonable to contend that the meaning of the language of Section 2 above quoted when inserted into the franchise of 1892 at once meant something different and greater than it had meant in the franchise of 1884? We think not. The Street Railway Company had a right to assume that by its omission the burden which had been imposed upon it under the franchise of 1884 was not imposed upon it by the franchise of 1892.

Moreover the word "repair" as used in connection with streets had a definite legal meaning in the State of Wisconsin at the time of the acceptance of the franchise of 1892, and it should be given this meaning at the time of its incorporation into the franchise.

In the case of *Blount v. City of Janesville*, 31 Wis. 648 the Wisconsin Supreme Court held that "repair" did not mean "pave" or "repave", but said at p. 654:

> "It refers rather, we think, to the ordinary repairs which are necessary to keep the street in a good condition when there has been a partial waste or destruction of the existing material."

This definition of "repair" was first changed in Wisconsin in The Milwaukee case, 151 Wis. 520, where the court seems to have adopted the New York rule. The Milwaukee case, however, was not decided until 1913; and we fail to see how the court can change so materially the meaning of a very material word in 1913 and then apply the changed meaning to the word used in a franchise which was accepted in 1892. Such a change alters and impairs the contract and its obligation.

Considering then the plain and evident intention of the parties at the time of entering into this franchise agreement, the meaning of the provision relied on by the City plainly does not and cannot impose upon the defendant the obligation to pave and repave the railway zone without impairing the obligation of the contract. The franchise should be construed as if the rule in the Blount Case above were stated in the Contract. Ennis case 233 U.S. 652

B. The omission of that part of Section 3 above quoted of the franchise of 1884 from the franchise of 1892 is in effect an affirmative declaration that the Street Railway Company should not pave or repave the railway zone.

By the provisions of section 3 of the franchise of 1884 that duty was imposed upon the Street Railway Company and assumed by it. The absence of that provision from the franchise of 1892 not only relieves the Street Railway Company from that burden, but its omission in the franchise of 1892, it having been contained in the franchise of 1884, amounts to an affirmative declaration that under the franchise of 1892 the duty to pave and repave was not imposed upon the Street Railway Company.

In the case of *Smith v. Eau Claire*, 78 Wis. 457, a provision imposing upon the city the liability for damages sustained by a change in the grade of a street imposed in an earlier charter, was omitted from the existing charter. In holding that such omission amounted in effect to an affirmative declaration that no such duty was imposed upon the city the court said:

> "Chapter 184 of 1889 does not charge the city with liability for consequential damages caused by a lawful change of the grade of a street. Standing alone, it is as complete an immunity from such liability as though it had been expressly enacted therein that the city should not be so liable. The former statute imposed such liability in terms."

This decision was rendered in 1890, two years before the present franchise was granted and accepted. The rule of construction then declared is in accordance with the general rule.

At any rate it became the law of this state, on which the Railway Company had the right to rely, and became part of the contract.

The radical error committed by the Supreme Court in construing the franchise of 1892 is its mode of ascertaining the intent. The Court seemed to assume that the Common Council legislating in the interest of progress ought to have compelled the Company at all times to pave the railway zone if ordered so to do and that it could not be presumed that such a duty was omitted.

The mistake lies in disregarding the fact that, with the franchise ordinance which required paving, before their eyes the council deliberately omitted that provision in the new ordinance.

This view was well stated by Mr. Justice Barnes in his dissenting opinion in this case as follows:

> "It must be conceded (1) that the ordinance before us does not by express language cover repaving; (2) that the majority of courts hold that it does not do so by implication; and (3) that the

ordinance, being ambiguous, must be construed so as to carry out the intention of the parties, if that intention can be ascertained with reasonable certainty. There is no question of private or public consideration that can ever justify a court in placing a construction on an ambiguous contract known to be one that defeats the intention of the parties thereto, and neither is there any justification for construing an ambiguous act of the legislature or of a common council so as to defeat the intent of the legislative body, if that intent is manifest.

To my way of thinking it is perfectly clear that the parties to this franchise did not intend to impose the cost of repaving on the railway company.

The council when it adopted the 1884 franchise had clearly in mind that the obligation to repair did not or might not include that of repaving. Sec. 2 of that ordinance covered repairing and was literally copied into the ordinance of 1892. Sec. 3 of the 1884 ordinance expressly and definitely covered the matter of repaving. This was entirely omitted from the ordinance of 1892 and was repealed by it. So we have a case where the council had before it an existing ordinance which required both repairing and repaving to be done and where it repealed the section imposing the duty to repave and re-enacted the one which imposed the duty to repair, and yet it said that it intended to impose both duties on the defendant. I can well see how a council might ordinarily think that the duty to repair included the duty to repave. But where the ordinance which was about to be superseded and repealed specifically imposed both duties, it is inconceivable that, if it was intended to impose both by the new ordinance, the part of the old which provided for one of them should be actually repealed. The attention of the council was sharply called to the fact that repairing and repaving were two different things."

In the case of *Indianapolis & E. Ry. Co. v. Town of New Castle*, 87 N. E. (Ind.) 1067 the town brought an action to recover the cost of paving that portion of street lying between the ends of ties of appellant's track. The franchise to the Railway Company was in the form of an ordinance; and Sec. 3 of the original ordinance provided, that appellant may take up or alter any track or lay any track in any other street as it may from time to time determine, but shall put the vacated street in as good condition for travel as it was before said track was taken up, and shall put the street in as good condition where the track is laid as it was before such track was laid; *that it shall keep all that portion of the street lying between the ends of its ties in good repair.*

When this ordinance was later amended the agreement to pay for the improvement of that portion of the street lying between the ends of the ties of appellant's track was omitted.

The Court says at page 1069:

"It thus is made to clearly appear that the new ordinance was intended to supersede the old and embrace the entire regulations on the subject; the language of the first section being that the original ordinance 'shall be amended to read as follows', clearly indicating that the amendments were intended to apply to the ordinance as a whole. Every subject in the original ordinance is covered by the amendatory ordinance unless the improvement of streets, which is included in a section for the repair of streets, should be called a subject. But the fact that all the other matters connected with this provision are specifically re-enacted would clearly indicate that it was the intention of the parties to eliminate the contract for the payment for improvements. And, while there is no provision in the amendatory ordinance that specifically declares that it shall stand as the only ordinance or that specifically repeals any other ordinance, yet, under the well-settled rule that, where it clearly appears that the new ordinance was intended to replace the old and embraces the entire regulation on the subject, it must be construed as a repeal of the former ordinance on the same subject. (Citing cases.) It must be held that the second ordinance upon its passage extinguished the first and became the existing contract between the parties."

C. The Milwaukee Case (151 Wis. 520) distinguished.

The decision of the state court in the Milwaukee case as we understand it was based entirely upon a construction of the language of the provisions of the franchise involved. The court approached the question as an original one, there being no decision on the question in this state. The Court said:

"So far we have discussed the question as an original one and have reached a conclusion upon consideration of the language of the ordinance alone. This course has seemed best, not because of the absence of cases in which somewhat similar questions have been presented to the courts, but rather because differences in the wording of the clauses governing the rights in the various cases render it quite impossible to say that any given case is exactly parallel to the one before us." * * *

The two essential provisions of the franchise considered in the Milwaukee case, and upon which the court's construction and decisions are based are—

1—That the Railway Company was required to keep in repair *a certain portion of the street.*

Milwaukee Case, 151 Wis. 531.

2—That the repair must be made of the *same material as that of which the street was composed at the time.*

Neither of these provisions is contained in the franchise in issue in this case. The provision of the franchise now in issue upon which the city relies is the following:

> "Said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair *so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense.*"
> (Italics are ours.)

This provision does not contain either of the clauses essential to the decision in the Milwaukee case, but on the contrary specifically defines the kind of repairs which were imposed upon the Company by that provision.

The kind and nature of the repairs contemplated by the provision above quoted are defined by the provision itself to be "so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness."

The obvious purpose of such repairs is to keep the portion of the street within the railway zone a part of the traveled street. The problem of keeping the railway zone in such repair as not to interfere with travel over the same and keeping the same in proper condition of cleanliness has nothing whatever in common with the problem of paving the street or repaving it, or of the kind or nature of the pavement which may be put between the rails.

The Street Railway Company can comply with the obligation of keeping the railway zone in such condition as not to interfere with travel, and keep the same clean no matter what the nature or kind of the pavement in the street in the railway zone may be.

That the language relied on by the city does not mean anything more than this is clear from the intention of the parties at the time of entering into the contract which the franchise represents. This intention of the parties has already been considered and the proposition has been advanced that the court must construe the language of the provision of the franchise, and particularly the word "repair" in the light of the facts and circumstances surrounding the parties entering into this contract, and give such language and that word the meaning which it had at the time of entering into the contract. To give the word "repair" a special meaning which it has since acquired will not give expression to the intention of the parties as to the meaning of that word at the time the same was used by them.

The decision of the Milwaukee case therefore is in harmony with the contention now made that the obligation of the defendant in relation

to the cost of the pavement in question should be determined by a construction of the provisions of the franchise relied upon.

Such a construction in the light of all the facts and circumstances surrounding the making of this contract and the meaning of the word "repair" as then used and intended by the parties clearly shows that the language relied on by the defendant in error does not impose upon the Company the burden to pay the cost of the pavement in question.

The Milwaukee case is distinguished from this case in issue merely by the fact that the provisions of the franchise considered in that case are different from the provisions of the franchise considered in this case.

In the opinion of the Supreme Court in the present case the essential difference of the two franchises in Milwaukee and Madison is conceded, but it is assumed that the same general principle governs in both cases. We submit however that with contract provisions so essentially different any general statements contained in the opinion in the Milwaukee case should not have influenced that court and should have no weight with this court in considering the present case.

The Supreme Court of Wisconsin in the present case was in error in assuming that before the ordinance of 1910, the street had been paved. Transcript p. 163. The circuit judge found upon the undisputed testimony that prior to 1910 the avenue had never been permanently improved; that before that year portions of the street had been covered with crushed stone, and that the company had relaid the area covered by its track. Transcript p. 36. The Supreme Court assumed to follow the rule laid down in Elliott on Roads and Streets which was quoted in the Milwaukee case as follows:

> "Our conclusion is that where there is a clearly expressed requirement binding the company to repair, the duty is a continuing one, and the repairs must be so made as to correspond with the changed condition of the street wrought by the improvement made under the direction of the municipality. . . . To illustrate our meaning: If a street paved with wooden blocks is subsequently paved with stone, it would be the duty of the company, when it became necessary to repair after the improvement by paving with stone, to make repairs to correspond with the changed condition of the street. It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement. Any other rule would make the duty to repair practically valueless, and not only this, but it would tend to check the growth and development of towns and cities without just reason or excuse."
>
> Elliott on Roads and Streets (3d ed.) at Secs. 987, 988.

But the court seems to have failed to appreciate that whatever application this rule might have had under the ordinance in the Milwaukee case, it is directly opposed to the doctrine that a *new pavement* can be required by the city under a mere contract to repair. The whole weight of authority is contrary to such a view.

D. The obligation to repair does not require repaving.

A provision in a street railway franchise requiring the Railway Company to repair the space between the rails and one foot on the outside thereof, "so as not to interfere with travel over the same" does not obligate the company to pave or repave the streets.

Even if it were an original proposition, and if the omission of the clause in question from the franchise of 1892 did not amount to a declaration that the city was not required to pave, the new franchise construed alone does not require the company to pave.

We quote from an early decision of this court:

> "The language of it is somewhat peculiar, and it cannot well be denied but that a fair and reasonable interpretation favors this view. It is as follows: 'The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition.' Now, it is quite clear that the above recitals embrace the whole subject of improvements of the streets, and that it was present to the minds of the parties when entering into the stipulation respecting repairs that followed. And this being so, it is difficult to deny, but that these stipulations were made as fixing the proportion or share of these general improvements which should be imposed on the company, namely, they should keep in good condition and repair eight or sixteen feet, as they used a single or double track, along the entire length of the road. They were not to grade, pave, macadamize, fill, or plank even the above width or distance, except so far as such work came within the category of repairs. . . .
>
> In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the

law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

Chicago v. Sheldon, 9 Wallace (U. S.) 50, 54.
Dillon's Municipal Corporations, 5th Ed. Section 1276.
State ex rel. Kansas City v. Corrigan St. Ry. Co., 85 Mo. 263, 55 Am. Reps. 361.
State ex rel. Kansas City v. Corrigan, 86 Mo. 67.
City of Williamsport v. Williamsport, 206 Pa. St. 65, 52 Atl. 51.
Western Paving & Supply Co. v. Citizens St. Ry. Co., 128 Ind. 525, 26 N. E. 188.
Phil. v. Hestonville, etc., Ry. Co., (Pa.) 35 Atl. 718.
U. R. W. R. & E. Co. v. Balto, 121 Md. 499, 558, affirming Baltimore v. Scharb, 54 Md. 499, 525, 526.
Hurley v. Trenton, 66 N. J. L. 538, 539.

"When the requirement of the statute, or of the condition of the franchise, is merely that the company shall repair the street, there is no obligation upon the company to do more than make such repairs as are required to keep the street in a safe condition for public travel, and the company cannot be compelled to pave the street, or bear the cost thereof. But when the company is required not merely to repair, but to keep the portion of the street occupied by its tracks in as good repair and condition as the remainder thereof, the courts have, in some instances at least, construed this obligation as requiring the company to pave the street whenever paving is necessary to bring the portion occupied by its track into as good condition as the rest of the street."

3 Dillon Mun. Corp. (5th Ed.) Sec. 1276.

The court will observe that the language of the provision of the franchise relied on by the city is not the ordinary language appearing in franchises to street railway companies which are considered in various cases cited in this brief, and others which will no doubt be cited in the brief of the defendant in error. The provision itself contains a definition of the kind of repairs which are intended.

The provision provides that the company shall make such repairs "*so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness.*"

So that the provision of the franchise in question is clearly within the quotation from Dillon given above.

The defendant is obligated under the franchise to do only such work as will keep the space between the rails and one foot on the

outside thereof in such condition that the railway zone remains a part of the traveled portion of the street, and the defendant must also keep that portion in proper condition of cleanliness.

This is an entirely different provision from that considered in the case of Mayor, etc., of the City of New York v. Harlem Bridge, 186 N. Y. 304, 78 N. E. 1072, and relied upon by the Wisconsin Supreme Court.

The court seems to have assumed that by the franchise of 1892 "the street was substantially surrendered to the grantee within the railway zone." 156 Wis. p. 365 (Transcript p. 161.) And the natural inference is that the duty to pave must have been imposed upon the company. This is in the face of the clause in the contract which expressly reserves to the city the wide power of repairing and improving the streets and even the right to take up the rails and structure of the road when such repairs were necessary. (Transcript, p. 20.)

It seems to have been assumed that it was then the common mode of granting franchises of this character to impose this burden upon street railway companies. 156 Wis. 367, 379. (Transcript, p. 162, 170.)

And that if the franchise is not so construed as to impose that burden it would follow that the common council "had grossly failed to perform its duty." 156 Wis. p. 367. (Transcript, p. 162.)

It seems to us that this process of reasoning and the conclusions which follow from it amount to judicial legislation.

The history of street railways, and the judicial reports afford no warrant for the conclusion that this duty of paving was as early as 1892 generally imposed upon street railways in small towns, or that in the absence of contract it was the duty of street railways to construct paving, or that it was the duty of common councils to require it.

The idea runs through the whole opinion that without regard to the contract it was the general duty of street railway companies to pave the railway strip; that there could have been no excuse for omitting in the second franchise the paving clause unless there was an intention to impose greater burdens upon the company. 156 Wis. p. 381. (Transcript, p. 170, 171.)

These were purely matters of legislative policy and we submit that the franchises of 1884 and 1892 and the effect of one upon the other should be construed according to their plain language.

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V.

The Railway Company has fully met its obligations of repair.

The obligation resting upon the defendant under the franchise is to keep the railway zone in such repair "so as not to interfere with travel over the same." This the company did. (Transcript p. 137, 139.)

No notice of any kind had been served on the street railway company by the city at the time the asphalt pavement was ordered that the railway zone was out of repair and no request had been made to put the same in repair. (Transcript p. 139-140.)

The company has been ready, willing and able at all times to keep the railway zone in such repair so as not to interfere with travel over the same as required by its franchise. (Transcript p. 140, 141.)

At the time the asphalt pavement was ordered the railway zone was the only portion of University avenue which was macadamized. While the macadam may have been worn yet the railway zone was the portion of the avenue on which most of the travel went. (Transcript p. 139.)

The paved portion of University avenue is 66 feet wide with a railway strip in the center. This leaves a wide paved portion of the street on both sides of the railway zone, and traffic would naturally go on that portion of the street which had been asphalted. (Transcript p. 65, 66.) There was no occasion for traffic taking the railway zone or being heavier on the railway zone. It is perfectly feasible and practicable as is conceded by most of the witnesses for the city, to have the railway zone of macadam with the rest of the street of asphalt by placing headers along the length of the railway zone. (Transcript p. 50, 89, 108.)

It is equally practicable to keep the railway zone if of macadam in such state of repair as to offer no obstruction whatever to vehicles crossing the railway strip. (Transcript p. 62, 63.) The obligation of repair resting on plaintiff in error did not require a change of pavement within the railway zone. The retention of macadam within the railway zone would in no way interfere with the proper and efficient use of the street, and it could easily be kept in repair. Mr. Icke, the former city engineer, says:

> Q. Then you could keep your macadam on the railway strip so that it would be fully as smooth as the asphalt for purposes of crossing the railway strip.
>
> A. I think it could be kept smooth with constant care, constant attention."
>
> (Transcript p. 63.)

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Inasmuch therefore as it was practicable and feasible to retain macadam within the railway zone and the street railway company could repair and keep in repair such macadam so that the same would not interfere with vehicles passing over the same, there was no occasion for making the change of pavement so far as the street railway's obligation of repair was concerned. That obligation was met by it and could be met by it without in any way changing the nature of the pavement in the railway zone.

In the opinion of the State Court considerable stress is placed upon the finding of the trial judge that the railway zone was out of repair, and the further finding that the "macadam formed of the crushed stone used by the defendant on its tracks on University Avenue is not a proper pavement for a street having as heavy traffic as University Avenue." (Transcript p. 37.)

In view of the fact that the street had never been permanently improved, but only by throwing on it loose crushed stone, we submit that this finding is of little significance.

The railway company had used the same kind of crushed stone as that used by the city, and the railway zone was in much better condition than the rest of the street; and for this obvious reason no complaint as ever made to the Company.

The Company has never insisted that it had the right to use this crushed stone and would use no other material in keeping the street in repair.

The Company has never denied its duty to keep its part of the street in proper repair as defined by the ordinance of 1892, that is "so as not to interfere with travel over the same, and to keep the same in proper order and cleanliness."

The decision of the State Court proceeded upon the theory that the "material used by the defendant" is not a proper material.

There is no finding that no material but asphalt would be suitable, and such as not to interfere with travel. Such a finding would be manifestly absurd. In construing the franchises, and determining whether they required the railway company to construct a part of the street and to use asphalt, it was quite immaterial that the city and the Company had hitherto used a defective material or that the material so used was not suitable to be used in connection with asphalt.

We concede that the Company is bound by its contract, and whatever material is used by the City, the Company will be compelled to keep its section in repair as prescribed in the franchise.

VI.

The holding of the Supreme Court that the city had the power to enact the penalty ordinance under the general power of regulation impairs the obligation of the contract and takes the property of the company without due process of law.

The Supreme Court sustained the ordinance of 1910 ordering the laying of the asphalt pavement and imposing penalties on the further ground that the city had the power to enact and execute the ordinance under that portion of the ordinance of 1892 which granted permission to enter upon, construct, maintain and operate a single track railway upon the streets of the city upon the express condition that the Company should construct and have in operation within four months a line of railway, describing its extent, and then added

> "Subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact."
>
> (Transcript p. 161)

This portion of the second ordinance was not contained in the ordinance of 1884 and the court seems to have placed great stress upon this act. (Transcript p. 170. 156 Wis. 380.)

The Court seems to treat this as a new grant of power to the city and broad enough to authorize the ordinance in question. (Transcript p. 170. 156 Wis. 380.)

The general statute Section 1862 R. S. Wis. 1898 frequently referred to in the opinion of the Wisconsin Supreme Court has been substantially the same since 1878, and was in force when both of the franchises in question were granted, and is as follows:

> SECTION 1862. Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under whatever law formed, or to any person who has the right to construct, maintain and operate street railways the use, upon such terms as the proper authorities shall determine, of any streets or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all the necessary curves, turnouts, switches and other conveniences. *Every such road shall be constructed upon*

the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed."

Section 1862 Statutes Wis. 1898. 1878.

Under the general statutes of the state which were in force before the franchises were conferred cities had the power

"to lay out, make, open and keep in repair, alter or discontinue any highways, streets, lanes and alleys, keep them free from incumbrances and protect them from injury. "

Section 925–52, Subd. 30.

"To establish and alter the grade of streets and sidewalks; regulate the manner of using the streets and pavements; protect the same from injury by vehicles used thereon," etc.

Section 925–52, Subd. 31.

In Subd. 51, Section 925–52, cities were given the power

"To regulate the use of locomotive engines within the city, direct and control the location of railway tracks in the streets, regulate the speed of railway trains within the city and require railway companies to construct and maintain at their own expense such bridges, viaducts, tunnels or other conveniences at public railroad crossings as the council may deem necessary; also to regulate the running of street railway cars, the laying down of tracks for the same, the transportation of passengers thereon and the kind of rail to be used."

It is clear that before either of these franchises was granted the city had all those powers of mere regulation which ordinarily belong to cities in dealing with their streets and highways; in other words the usual police powers which are necessary for the proper management and control of streets.

The general police powers of the city and the general powers of regulation contained in the statutes were just as much a part of the franchise of 1884 as if it had contained the language of the statutes.

This is obvious without the citation of authority. But the Wisconsin Supreme Court has expressly held that this section "affects the construction of ordinances to the same extent as if it were expressly written into that ordinance."

State ex rel. Milwaukee, 157 Wis. 121, 125.

And that it is "as broad as language can make it."

State ex rel. Milwaukee, 157 Wis. 121, 125.

The omission in the first franchise of the general power of regulation of the streets, in view of the general statutes of the state had no significance whatever.

In the same manner the express declaration of the general power of regulation of the streets and highways in the second franchise had no significance.

On this branch of the case as on the other branch we submit that the State Court *failed to duly consider the fact that the first franchise imposed the burden of paving and that the second omitted it.* The view expressed in the opinion seems to be that it was understood that the power of regulation was greatly extended in the second franchise by the regulation clause above quoted, and that it was understood that the City surrendered its express power given in the first ordinance to require the paving, for the broader power implied in regulation.

When we consider the fact that there was no new power of regulation contained in the second franchise beyond that always possessed by the City the fallacy of the contention is very plain.

In view of the history of the ordinances we submit that the second one should be construed in the same manner *as if it had contained the affirmative declaration that the company was not bound to pave.*

If we are correct in this it would of course be absurd to claim that the general clause as to regulation or the general police power would overrule the specific and vested rights of the Company.

In his dissenting opinion Mr. Justice Barnes after quoting the provision of the ordinance relating to regulation said:

> "I do not conceive that this general provision covers anything aside from the manner in which the streets should be used and in which cars should be operated therein. It seems to me to be far-fetched to say that the reservation of the right to pass the rule or regulation referred to comprehended the right to compel the construction of a part of a street. If a part, why not the whole? If the whole, then an easy way has been discovered to relieve the city from the expense of street building along the line of defendant's road. I confess that I am too dense to see how the right to pass a rule or regulation respecting a street gives authority to compel a user to build it. The city by express provision in the franchise specified what the defendant was required to do in the way of repairing streets, and having repealed the provision of the old ordinance in regard to the repaving, it is perfectly manifest that the general provision above quoted was not intended to cover repairing or repaving.'
>
> City of Madison v. So. Wis. Ry. Co., 156 Wis. 352, 385.

In the opinion of the court numerous instances are given for the purpose of illustrating the unlimited power of a city which may be implied from the authority to regulate its streets; but no case is

cited and no illustration given which would be authority for the proposition that a city under the authority to regulate streets may compel a public utility to construct and build a considerable portion of its streets.

We submit that the only case cited which is at all similar is that of Fielders v. North Jersey St. Ry. Co., 68 N. J. L. Rep. 343, 53 Atl. 404. In that case it was sought to justify the imposition of this duty upon a street railway company under its general power of regulation. In that opinion the court gave illustrations of municipal control which would be proper under the power of regulation.

The Supreme Court of New Jersey as shown in this opinion had recognized fully the power of municipal corporations to regulate and control their streets, but when the court came to consider the claim that the company could be compelled to pave its streets under the general power of regulation the court said:

> "It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but for the purpose of showing how rational is the distinction, and how easy of application, and in order to demonstrate how impossible it is that a power conferred by the legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation, be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature. It has a use of the streets differing only in kind from that of other citizens using them, and has no interest in the soil. It is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel. It is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But entirely independent of any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement, and the further duty to keep such pavement, when laid, at all times in repair. To call this 'regulation,' or an exercise of the police power, is a misuse of terms. It is taxation pure and simple. It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once familiar operation known as 'working-out' the township road taxes by the labor of the inhabitants. Gen. St. p. 2817, Sec. 51 et seq. A power that will not support the imposition of license fees fixed on a revenue basis will certainly

not support an ordinance of this character. We therefore hold that the ordinance is not supportable as an exercise of the police power, and, since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails, or to repave that portion of the street."

We quote at some length from this decision because it is the only case referred to in the opinion analagous to the present case, and in our judgment, by the opinion of the Wisconsin court, it is disposed of in altogether too summary a manner.

Since the decision in the case at bar by the state court, three of the seven judges in construing Sec. 1862 R. S. above referred to have expressed the view that the "reasonable rules and regulations"

> "which the city is authorized to impose from time to time afterwards are simply police regulations not inconsistent with the terms originally imposed. Otherwise it would seem that the city might at any time require the street car company to pave the whole street and justify its action as an exercise of the reserve power to impose reasonable rules and regulations."
>
> State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., 157 Wis. 138.

Although the right to pass the penalty ordinance under the police power of the state is alluded to in the decision of the state court, the opinion does not seem to be based on the police power, but upon the supposed new power of regulation conferred by the ordinance of 1892. 156 Wis., p. 378; Transcript, p. 170.

We of course concede that under the police power the city would have had the right to pass such ordinances as might have been necessary to promote the health, comfort, safety or welfare of the community.

But we do not concede that this power can be so extended as to violate the terms of the contract and to compel the company to construct portions of the street which, by the terms of the franchise properly construed, should be constructed by the city.

We insist that the ordinance of 1910 does not come within any of the established rules of police power; and that it cannot be sustained as a reasonable regulation either under that head, nor under the supposed extension of municipal power claimed to have been conferred by the franchise of 1892; and hence that the decision of the state court gives effect to a law of the state which violates the obligation of the contract, and deprives the company of its property without due process of law.

Effect of Section 1862, Revised Statutes of Wisconsin.

The foregoing discussion makes it unnecessary to indulge in extended argument as to the effect of section 1862, Revised Statutes of Wisconsin, which we have already quoted.

We have pointed out the kind of regulations which we understand that statute to confer and the limitations upon the power reserved. This is not a question of the *power which the legislature might exercise* under its reserved power, to enact statutes changing or repealing the franchise of 1892 or regulating the paving of street railways.

It might be claimed that the legislature might radically change the franchise contract under its reserved power, but it cannot with reason be contended that this reserve power permits a municipal corporation to make such a contract as this and then to repeal or vitally change it.

In the opinion of the state court (Transcript p. 171; 156 Wis. 382) it seems to be held that the power of regulation in the city conferred by section 1862, Revised Statutes, would permit almost any change. It is said 'the idea of the law makers is that the broad power is not subject to exhaustion or limitation by any specific requirement in the grant." (Transcript 171.)

This seems to us a most extraordinary construction to place upon a statute authorizing a municipality to grant franchises.

It seems to us a construction reversing the well settled rules as to the interpretation of the statutes and contracts, and one which leaves the investors of money without protection under the constitutional provisions which we invoke.

This conclusion of the court seems to be based more or less upon a former decision, State ex rel. Attorney General v. Madison Street Railway Co., 72 Wis., 612. This was a decision upon a demurrer, and held that under section 1862 according to the allegations of the complaint the company had failed to use the rails prescribed by the statute, had failed to build a considerable portion of the line required by its charter and in other ways had violated its charter. The principal question was whether quo warranto was the proper remedy.

The court held it is true, precisely what we claim, that the franchise had the effect of a law and that it constituted, when accepted, a contract. It was also held that quo warranto was the remedy and that for clear violations of the contract the franchise might be forfeited.

But we submit that there is not a clause nor a word in the decision which can form any basis for the extraordinary powers of regulation now assumed to exist.

VII.

The franchise under which defendant is operating is a contract between the company and the city, and to hold company liable for the cost of original pavement would be a violation of the United States Constitution and statutes, and especially of Article I, Section 10, United States Constitution, and would be depriving the company of property without due process of law in violation of the fifth amendment to the United States Constitution.

A charter granted to a street railway company to construct and operate a street railway within the corporate limits of a city constitutes a contract between the railway company and the city.

Chicago v. Sheldon, 9 Wallace 50.

Western Paving & Supply Co. v. St. Ry. Co., 128 Ind., 525, 25 Am St. Reps. 462, 26 N. E. 188, 10 L. R. A. 772.

The liability of the street railway company being fixed by its charter, neither the city council nor the state legislature can alter it without the consent of the company.

Western Paving & Supply Co. v. St. Ry., 128 Ind. 525, 25 Am. St. Reps 462, 26 N E. 188, 10 L. R. A. 772.

Coast Line Ry. Co. v. Savannah, 30 Fed. 646.

Chicago v. Sheldon, 9 Wallace 50.

It is respectfully submitted therefore that the judgment should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 260.

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error.

vs.

CITY OF MADISON,

Defendant in Error.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

NATURE OF ACTION AND STATEMENT OF CASE.

The statement under this heading in brief of plaintiff in error in general is a fair statement of the nature of the action. On page 3 of the brief, however, the plaintiff in error refers to certain items of testimony, with page reference to transcript, which might lead the court to believe that these are to be taken as facts in the case. For instance, it is stated on page 3 of its brief that it is feasible and practicable to keep the railway zone of macadam and pave the rest of the avenue with asphalt.

As a matter of fact, the plaintiff in error requested the trial court to make a finding of fact to that effect which the trial court refused to do. (Transcript p. 149.) Likewise on request of the plaintiff in error the court refused to find that the city of Madison at no time informed the defendant or any of its officers or agents that the portion of University Avenue from Park Street to Chandler Street between the rails of the defendant and one foot on the outside thereof was out of repair, or made any request that the same be placed in repair. (Transcript p. 149.) The findings of fact of the trial court are found in transcript on pages 36 and 37. The findings of fact are to the effect that the space between the rails of the street railway company and one foot on either side had become so out of repair as to interfere with travel over said space and the tracks laid thereon; that the said area was in places so out of repair that it was difficult for vehicles to pass from one side of the tracks to the other; that the macadam at places and especially at street intersection was from two to four inches below the level of the top of the rails; that there were grooves or ruts worn in the macadam parallel with the rails which were two or three inches in depth; that the paving on the railway zone was in such a state of repair in 1910 that at most places vehicles could not cross without exercising more than ordinary care; that the crushed stone placed upon the tracks of the railway company had become worn down between the ties causing

a series of depressions between the ties which was perceptible to anyone who drove along the track in a vehicle.

The court further found that macadam formed of crushed stone used by the railway company in its tracks is not a proper pavement for a street having as heavy traffic as University Avenue and that the macadam wears down rapidly causing depressions which would interfere with travel over the same from the asphalt pavement and that the travel over such depressions would injure the asphalt on either side of the railway zone and in warm weather small particles of crushed stone would be carried upon the asphalt when soft and cause permanent injury to the asphalt. Transcript p. 37.)

The findings of fact made by the trial court and requests made by the railway company for findings of fact which the trial court refused, (Transcript p. 149) in connection with the statement in brief of plaintiff in error under this heading furnishes a fair statement of the nature of the action.

ARGUMENT.

I.

This court has no jurisdiction of the appeal.

A. No Federal question was involved.

The defendant in error has previously filed with the court a motion to dismiss for want of jurisdiction and both parties have filed briefs in connection therewith and we understand that said motion is to be considered at this time. Inasmuch as the transcript had not been printed at the time the motion was made and plaintiff in error has argued the questions in the brief served at this time and filed additional assignments of error, it is necessary for the defendant in error to refer again to this question in this brief.

At the outset, it is important to ascertain what Federal question, if any, is presented under the pleadings and by the issues in this case. The defendant in error contends that the only question presented to the state courts, either by pleading or argument under which the plaintiff in error contended that a Federal question was involved, was the construction and interpretation of the franchise of 1892.

In the answer served by the railway company (Transcript p. 35) the following are the only allegations which pertain at all to the question at hand:

"Further answering said complaint defendant alleges that its said franchise granted by the plaintiff city on June 10, 1892, and under which this defendant is now operating its street railway system in the plaintiff city is a contract between the plaintiff city and this defendant under the right and benefit of which defendant is protected, not only by the laws and constitution of the State of Wisconsin but by the laws and the Constitution of the United States."

"To hold notwithstanding the expressed terms of said franchise or contract that the defendant company should be compelled to pay the cost of said improvement referred to in the complaint would be to deny to the defendant equal protection of the laws and constitution of the United States and would be taking from the defendant property and contract rights without due process of law contrary to the provisions of the Constitution of the United States."

In a stipulation entered into between the city and the railway company set forth in the city's complaint (Transcript p. 29) the following two paragraphs occur

"Whereas the city of Madison insists that it is the duty of the railway company under its franchise and the laws of Wisconsin to grade, pave and otherwise to improve that portion of said avenue between its rails, and one foot on the outside of each rail to correspond generally with the proposed improvement of the avenue and has heretofore ordered and directed the railway company that it do such work as therein directed, and

"Whereas the street railway company insists that such is not its duty and on demand by the city has refused and still refuses to do said portion of said work, except to grade."

The trial court decided the case upon the assumption that the franchise of the railway company is a contract and that its rights and obligations are fixed by the ordinance of 1892 and construing that ordinance in the light of general rules it ■ deemed applicable thereto, and following a prior decision of the Supreme Court of Wisconsin, the trial court held that the city was entitled to judgment for the amount expended in paving the street railway zone. (Transcript p. 38.)

In the brief filed by the plaintiff in error with the Supreme Court of Wisconsin upon the argument of the case, the so-called Federal question is presented under the following heading:

"The franchise under which defendant is operating is a contract between the defendant and the city and to hold defendant liable for the cost of original pavement would be a violation of the United States Constitution and statutes and especially of Article 1 Section X United States Constitution and would be depriving defendant of property without due process of law in violation of the fifth amendment to the United States Constitution."

While the above statement does not appear in the transcript in this case, reference is made

to it here for the reason that on page 9 of brief of plaintiff in error heretofore submitted in opposition to the motion to dismiss, reference is made to the argument in its brief before the Supreme Court of Wisconsin.

The Supreme Court of Wisconsin placed its decision on two bases and under the first ground held that the street railway company was required to pave the railway zone under the provisions of the franchise of 1892. Upon this ground all of the judges participating in the decision concurred except one. (Transcript pp. 160–165–172.) The second ground of the decision need not be referred to under this heading inasmuch as the general rule is that this court acquires no jurisdiction in such a case unless the decision by the state court is based on a Federal question which is controlling in the disposition of the case. Authorities to this proposition are cited on brief of defendant in error on motion to dismiss.

It therefore plainly appears from the record in this case that the only basis for the claim by the plaintiff in error that a Federal question is involved and was presented to the state courts is that the state courts improperly construed the franchise of 1892 and by so doing placed a burden upon the plaintiff in error which it should not be required to bear under its contention as to the proper construction of the franchise. This we submit under the authorities cited in our brief in the motion to dismiss does not involve a Federal question.

It appears from the records that the only contention alleged to present a Federal question made by the plaintiff in error and passed upon by the state courts concerned what the plaintiff in error conceived to be an erroneous construction of the franchise of 1892. It is well settled that the contention made and passed upon in the state courts cannot be enlarged by assignments of error to bring the case to this court.

Cleveland & Pittsburg R. R. Co. v. Cleveland, 235 U. S., 50.

B. The ordinance of June 11, 1910, is not legislative in character and does not impair the obligation of the franchise of 1892 and was not given effect by the state courts.

The plaintiff in error in its answer served in this case (Transcript p. 33) admits that the city informed the railway company of the defendant's determination to improve the said portion of University Avenue with asphalt pavement and that it requested the railway pany to likewise improve its right of way on said avenue, that is, the portion occupied by its tracks and one foot on each side thereof and that the railway company refused so to do.

It admits that thereafter and on or about the 11th day of June, the city adopted the ordinance ordering and directing the railway company to pave its right of way on said portion of said street and that the ordinance was

duly published and notice thereof given to the railway company.

It thus appears from the record that prior to the adoption of the ordinance June 11, 1910, there was a difference of opinion between the city and the street railway company with respect to the latter's duties under the franchise, the city insisting that it was the duty of the railway company to improve the railway zone in a manner similar to the improvement of the remainder of the street and that the street railway company refused so to do.

Thereupon the city adopted the ordinance of June 11, 1910, for the purpose, as plainly appears in the ordinance itself, of making a request in a formal way that the street railway company should do that which the city contended it was its duty under the franchise of 1892, namely, to pave the railway zone. The ordinance under consideration does not pretend to amend or modify the franchise of the street railway company but is merely a direction and order to the company to re-construct and pave its road-bed on the particular street in question according to the city engineer's plans and specifications or in accordance with such other plans for a crushed stone, concrete or other equally good foundation for its ties and a suitable asphalt surfacing for the railway zone so that when completed, the railway zone would correspond to the remainder of the asphalt improvement on the particular street.

It is submitted that the ordinance is administrative and not legislative in character

and that the city could have with the same force and effect directed the mayor or street superintendent to order and direct the street railway company to do the work in question.

New Orleans v. L. A. Sugar Co., 125 U. S. 18, 32.
Ross v. Oregon, 227 U. S. 150, 163.

That both the city and the street railway company understood and treated the ordinance in question as an administrative act of the city taken for the purpose of arousing the duty of the street railway company under its franchise of 1892 and not as an amendment or addition thereto is shown by the stipulation entered into between the city and the street railway company *subsequent* to the adoption of the ordinance wherein it is stated that the city insists (Transcript p. 29) that it is the duty of the railway company under its franchise and the laws of Wisconsin to grade, pave and otherwise to improve that portion of said avenue between its rails and one foot on the outside of each rail to correspond generally with the proposed improvement of the avenue and has heretofore ordered and directed the railway company that it do such work as therein directed and that the street railway company insists that such is not its duty and on demand by the city has refused and still refuses to do said portion of said work, except to grade. (Transcript p. 29.)

As stated in *N. O. v. L. A. Sugar Company* 125 U. S. 18, 32, it is not important that

the direction to the street railway company was put in the form of an ordinance. Nor is the fact that the ordinance contained a penalty of fifty dollars a day for each day of neglect on the part of the company indicative of any intention on the part of the city to place any new or different burden upon the street railway company from that imposed by the franchise of 1892 for the reason that section 4 of the franchise of 1892 (Transcript p. 25) contains a penalty clause providing for a fine or penalty of fifty dollars for any one offense growing out of the railway company's neglect or refusal to comply with the provisions of the franchise or with any regulation imposed by the council. Plaintiff in error refers to the ordinance of June 11, 1910, as a penalty ordinance when it is in fact no more of a penalty ordinance than the ordinance of 1892 granting the franchise under which the plaintiff in error is operating its street railway system.

Furthermore the matter of the penalty is eliminated from the case by paragraph 5 of the stipulation made between the city and the street railway company. (Transcript p. 30.)

The ordinance of June 11, 1910, partakes more of the nature of a resolution than of an ordinance.

> "An ordinance prescribes a permanent rule of conduct or government while a resolution is of a temporary character only."
>
> *2 McQuillan Mun. Corp.* Sec. 633.

Defendant in error contends that upon the record of this case, it appears that the state courts did not give effect to the ordinance of June 11, 1910, as a legislative act and that the situation presented by this case is quite different from that with which this court dealt in the cases cited on the brief of plaintiff in error.

In the *Houston Case* 177 U. S. 66, cited on brief of plaintiff in error, p. 7, the question was whether the state courts gave effect to the subsequent statute of 1870 and it appears that the subsequent statute was in fact the basis of the suit and if default had not been made by the railway company under the act of 1870 there would have been no basis whatever for the action.

In *Given v. Wright*, 117 U. S. 648, cited on page 9 of the brief of plaintiff in error certain Indian lands which had been exempt from taxation were sold under the provisions of the general tax law of the State of New Jersey. Taxes had been regularly assessed and paid without objection from 1814 down to 1876 a period of about sixty years. If the exemption from taxation were not lost by reason of the long acquiescence under the imposition and payment of taxes, then it is apparent that by the sale of the land for non-payment of taxes, effect would necessarily be given to the general tax laws of the state and consequently a case was presented within the jurisdiction of this court.

In *West C. R. Co. v. Chicago*, 201 U. S. 506, the city of Chicago by ordinance, adopted April 2, 1888, had granted to the railway company the right to construct a tunnel under the Chicago river. When the ordinance was passed there was in force a statute of the State of Illinois which made it a condition of the right of a street railway company to construct its road across any water in the state that it be constructed in such a manner as not to unnecessarily interrupt the navigation of such water. By a subsequent act of Congress, provisions were made for the dredging of the Chicago river and pursuant to that act which required the work of lowering of tunnels to be done or caused to be done by the city of Chicago, the city adopted an ordinance requiring the railway company without expense to the city to lower its tunnel under the Chicago river so as to provide a clear depth above said tunnel of at least twenty-one feet of water at all times. The city served notice upon the railway company to comply with this ordinance which the railway company refused to do.

The state courts issued a writ of mandamus to compel the required action by the railway company and writ of error was taken from the judgment of the Supreme Court of Illinois. The railway company claimed that the ordinance requiring it to lower the tunnel operated to impair the obligation of its franchise and the judgment of the state courts requiring the company to lower the tunnel was necessarily

adverse to the claim thus set up and presented a case for the jurisdiction of this court.

The subsequent ordinance requiring the railway company to lower the tunnel was the basis of the proceeding, there being no provision in the franchise with respect to lowering the tunnel.

The facts in the case of *St. Paul Gas Light Co., v. St. Paul,* 181 U. S. 142 are set out quite fully in brief of plaintiff in error on page 6 and need not be repeated here.

We submit, however, that instead of being authority to the point that this court has jurisdiction in the case at bar, it is quite to the contrary. It is there stated:

> "When the substantial scope of this provision of the ordinance is clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition, that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case at bar, we have merely a contention between the city and the street railway company as to the street railway company's obligation under its franchise and as the record shows that the construction and interpretation of the street railway's franchise was a matter presented to and passed upon by the state courts.

The situation would have been the same if, instead of passing an ordinance, ordering and directing the railway company to do the work of improvement as the city contended it should do under its franchise, the city had applied to the court for a writ of mandamus to order and direct the street railway company to perform its duty. The street railway company would have as much basis to make the claim that the action of the city by way of mandamus impaired the obligation of its franchise as it now has to make the claim that the order and direction of the city by way of ordinance impairs the obligation of its contract.

II.

The Franchise of 1884 was Repealed by that of 1892.

The state courts held that the ordinance of 1884 was repealed by the ordinance of 1892 and that the rights of the parties were to be determined solely under the latter franchise.

III.

The franchise of 1892 requires the street railway company to pave the railway zone when the city repairs the remainder of the street under the facts found by the trial court in this case.

A. Construction of the franchise.

Under Sub-division 4, page 13 of brief of plaintiff in error, this proposition is discussed and consequently the matter is necessarily argued in respondent's brief. Before proceeding to a discussion of the proposition, however, we respectfully submit, that under the decisions of this court, the construction of the contract is entirely a matter for the state courts and even though this court should be of the opinion that the state courts have erroneously construed the contract, no Federal question is thereby presented. This matter is discussed in brief of defendant in error on motion to dismiss, pp. 20 and 21, and we will at this point quote from a decision of this court which we believe is amply supported by the authorities and correctly states the law:

> "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the

obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states and not for the correction of alleged errors committed by their judiciary."

Central Land Co. v. Laidley, 159 U. S. 103, 110.

Nevertheless the plaintiff in error proceeds in its brief to discuss the state court's construction of the franchise of 1892, and to point out the errors it believes the court has made.

The franchise of 1892 contains the following provision:

"The road bed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said tracks at any and all points . . . And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same and shall keep the same in proper order and cleanliness at its own cost and expense." (Transcript p. 24.)

The Supreme Court of Wisconsin in construing the franchise of 1892 followed the general principles set forth in the previous case of *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.*, 151 Wis. 520, construing a similar street railway franchise provision.

Among the principles which the Supreme Court of Wisconsin considered proper to be

kept in mind in construing such a contract are (1) that in granting such a franchise the city council does not act as a proprietor or private citizen selling his property to another citizen but as a trustee for the public charged with a responsible duty; (2) that it is the imperative duty of the trustees to guard the public interest in every way which may be reasonably within their power and to secure to the public some fairly adequate return for the privilege granted and that therefore it must and will be assumed that the council endeavored to perform its duty and that stipulations and provisos were inserted for the purpose of securing and conserving for the public, advantages which are valuable and substantial rather than trifling and inconsiderable; (3) that if the language of the franchise is equally capable of two constructions, that construction which safeguards the public interests substantially will be given preference to that construction which secures only an insignificant or unsubstantial advantage to the public.

The principles thus announced by the Supreme Court of Wisconsin are in harmony with doctrines laid down by this court in numerous cases.

Blair v. Chicago, 201 U. S. 400, 472.
Water Co. v. Knoxville, 200 U. S. 22.

In the case last cited, the court in the opinion (p. 37) says:

"It is, we think, important that the court should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases that grants of special privileges affecting the general interests are to be liberally construed in favor of the public."

The Supreme Court of Wisconsin recognized that the authorities are not in harmony as to what should be the proper construction of such a franchise provision and in both the Milwaukee case and in this case adopted as a principle for its guidance the doctrine expressed by Elliott on Roads & Streets (3rd ed.) Secs. 987 and 988 which is epitomized in this case by the Supreme Court of Wisconsin as follows:

"Where the franchise granted to build, maintain, and operate a street-car system contains an express requirement to repair, it continues with the life of the grant, creating a duty of such performance as will make that portion of the tract to which it relates conform to the changes outside thereof, made from time to time under the direction of the municipality in order to render the way suitable for public use, and such performance includes, in making repairs after repaving by the municipality, with the same material as before, and repaving by substitution of a different material to conform to this changed condition as well."

Madison v. Southern Wis. R. Co., 156 Wis. 352, 368.

The Supreme Court of Wisconsin quoted with approval from *Mayor etc., v. Harlem*

Bridge M. & F. R. Co., 186 N. Y. 304, where the railway company was required by its franchise to "keep the surface of the street inside its rails and one foot on the outside thereof in good and proper order and repair."

The situation in the last cited case is very similar to that in the case at bar. At the time the charter was granted and the road constructed there was no complete pavement but only a sort of rough macadam road. The city later determined to pave the entire street with granite blocks and served notice on the company to likewise pave the railway zone. The company refused to do so and the court held that it was the duty of the railway company to put in the new pavement at its own expense in the railway zone. The Court said:

> "The question of what shall constitute keeping the pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least by reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had, for sufficient reason, decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition, and which was entirely

different from that adopted in the remainder of the street."

State ex rel. Milwaukee v. Milwaukee E. R. & L. Co., 151 Wis. 520.
Mayar v. Harlem Bridge Co., 186 N. Y., 304, 310.

Decisions of other courts are in harmony with the holding of the Supreme Court of Wisconsin in the case at bar, although as above stated the holding of authorities are not uniform.

Under a franchise which provides that the street railway company "shall at all times at its own expense and charge keep so much of the street upon which its railway is located as lies between the rails and within two feet of the outside of said rails in good order and repair," the Supreme Court of Virginia held that it was the duty of the railway company to lay the same kind of pavement within the railway zone as was laid by the city in the remainder of the street. The court said:

"If its only duty under its franchise had been to keep that portion of the street in question in good repair there would be force in its contention that it could not be required to lay a new pavement of a more costly character. But it is required by its franchise not only to keep that portion of the street in repair but 'in good order.' 'In good repair' does not necessarily mean in good order. The presumption is that those words or that term was intended to have some meaning and it must be given some effect."

Danville v. Danville Ry. Co., 114 Va. 382.

So also it is held by the same court that where a franchise requires a street railway company to keep its portion of the street "well paved and in good repair," that the railway company must put its portion of the street in the same condition as the rest of the street even though that necessitates the laying of a new pavement.

Norfolk & P. Co. v. Norfolk, 115 Va. 169.

A franchise provision requiring a street railway company to keep the part of the street used by it and for at least two feet outside of its tracks in as good repair and condition as the city keeps the balance of the street, is held to require the street railway company to pave the railway zone when the city paves the balance of the street.

State ex rel. Jacksonville v. Jacksonville R. Co., 29 Fla., 590.

The same conclusion is reached by the appellate court in Indiana with respect to a franchise containing somewhat similar provisions as follows: "And that the portion between the tracks and on the thereof outside to the limit of two feet shall be kept in as good repair and condition, considering the nature of the use, as other parts of said streets are kept by said city."

Columbus Street Ry. Co. v. Columbus, 43 Ind. App. 265.

The duty to pave the railway zone has been held in other cases to be imposed upon the

railway company under a franchise containing a somewhat similar provision.

Conway v. Rochester, 157 N. Y. 33.
Mechanicsville v. Stillwater, & M. St. P. R. Co., 71 N. Y. S. 1102.
Binninger v. New York, 177 N. Y. 199.

The Indiana Supreme Court holds that where a county is required to keep a bridge in repair that this duty extends to replacing or re-building the bridge in case of the destruction of the original bridge.

State ex rel. Roundtree v. Board of Commissioners, 80 Ind. 478.

B. Common Law Duty to Pave.

To give Section 3 of the franchise of 1892 the meaning contended for by plaintiff in error would render its inclusion in the franchise of no value whatever for the reason that it is a common law duty of a street railway company to make such repairs irrespective of ordinance or franchise provisions to that effect.

As stated by the Supreme Court of Pennsylvania:

"It is recognized with substantial unanimity that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition even in the absence of any express contract or statutory direction to that effect."

Reading v. Union Traction Co., 215 Pa. St. 250–255.

Reading v. Union Traction Co., 202 Pa. St. 571–573.

To the same effect *Railway Co. v. State*, 87 Tenn. 746.

Harrisburg v. Harrisburg P. R. Co., 1 Pearson (Pa.) 298.

Citizen S. R. Co. v. Ballard, 22 Ind. App. 151.

Western Paving & Supply Co. v. Citizen's S. R. Co., 128 Ind. 535–530.

Montgomery Street R. Co. v. Smith, 146 Ala. 316.

This common law duty is universally held to require the street railway company to keep its entire road bed to the end of its ties and its crossing in repair so as not to obstruct travel across or over its road.

The Pennsylvania decisions go farther and hold that this common law duty requires the railway company to pave or re-pave the railway zone when it is in fact out of repair and the city improves the rest of the street.

Reading v. U. T. Co., 215 Pa. St. 250–255.

Reading v. U. T. Co., 202 Pa. St. 571–573.

Gallagher v. Philadelphia R. T. Co. 51 Pa. Super Ct. 488.

McKeesport v. Pittsburg, etc., R'y Co. 55 Pa. Super. Ct. 47.

So it is apparent that the Supreme Court of Wisconsin in construing the franchise of plaintiff in error is supported by many of the

adjudicated cases and that its decision does not go as far as some of the cases cited.

C. Obligation of Franchise Duty to Repair. Cases Distinguished.

On page 24 of brief of plaintiff in error it is argued that the obligation to repair does not require repaving. This is already covered in the foregoing discussion and we merely call attention here to some of the cases cited upon appellant's brief under this heading, p. 25.

The case of *Chicago v. Sheldon*, 9 Wallace 50, was an action to restrain the collection of a special assessment levied upon the property of the street railway company for the improvement of the street and the contention was made that since the street railway company was required by its charter to keep the railway zone in repair, its property was thereby exempt from special assessment.

It will be seen that this case simply decided that it was beyond the power of the city to levy a special assessment upon the property of the street car company to defray part of the cost of paving the street where the company was by its franchise required to keep the railway zone in repair.

The franchise provision which it was claimed exempted the railway company from the levy of the special assessment is as follows:

> "The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of the streets upon which they shall construct their said

> railways or any of them, keep eight feet in width along the line of said railway on all the streets wherever one track is constructed and sixteen feet in width along the line of said railway where two tracks are constructed in good repair and condition during all of the time to which the privileges hereby granted to said company shall extend in accordance with whatever order or regulation respecting the ordinary repairs thereof may be adopted by the common council of said city."

The court held that the duty of the railway company was limited to repairs and that it was not liable for curbing, grading and paving the street with an entire new pavement. As observed by the Supreme Court of Florida in *State ex rel. Jacksonville v. Jacksonville*, 29 Fla. 590, 614, this result is apparent when it is observed that the ordinance provided that the parts of the street should be kept in good repair and condition in accordance with the regulation of the common council *respecting ordinary repairs*, and weight was also given to the fact that the city for many years had levied no special assessment upon the street railway company and it was apparent that the parties understood that the ordinance covered *ordinary repairs* only.

In *State ex rel. Kansas City v. Corrigan etc. R. Co.*, 85 Mo. 263, the company's franchise provided as follows:

> "The space between the rails of said track and the street for a space of two feet on

either side and along the line of said track and also all street crossings along the line of said street railroad shall be kept and maintained in good repair by said railroad company."

The street in question prior to the action had been an un-paved dirt or macadam street. The city proceeded under a contract to pave the street exclusive of the railway zone with Colorado sand stone to be laid on a concrete foundation nine inches thick and ordered the street railway company to likewise pave the railway zone. This the company refused to do but proceeded to lay down a pavement between the rails composed of stone blocks taken from a quarry in Argentine, Kansas, which were of the same dimensions as the Colorado sand stone blocks and at the time the action was begun was proceeding to pave the street in this manner. The action was solely to compel the railway company to use the same kind of material in the street car zone as was being used in the street outside of the zone, that is, Colorado sand stone instead of Argentine quarry stone although the latter was of the same dimensions as the former. The city relied upon an ordinance passed subsequent to the franchise providing that the street car company shall use the same material between the rails as was used outside of the rails.

The court held that the latter ordinance could not change the original franchise of 1869 which was silent as to the kind of material

and held that the city could not compel the use of Colorado sand stone instead of Argentine stone. It will be seen therefore that the decision of the court with respect to the proposition that the obligation to repair does not require paving is *obiter dictum.*

Furthermore the court assumed that the obligation to repair, is to repair the pavement, instead of repairing the street. An obligation to keep a pavement in repair might not include an obligation to put in a new pavement, like an obligation to keep a house in repair might not require the re-building of the house but an obligation to keep a part of a street in repair would include putting in a new pavement, if necessary, the same as an obligation to keep a house in repair would include the obligation to put on a new roof if the roof were destroyed.

In *Kansas City v. Corrigan*, 86 Mo. 67, the court simply follows its decision in the former case.

The Pennsylvania cases cited cannot be considered as authority in view of the latter decisions of that court cited upon our brief where the holding is that it is the duty of the street railway company to pave even in the absence of a provision in the franchise to that effect.

The case of *Western Paving & Supply Co. v. Citizen Street Railway Co.*, 128 Ind. 525, was an action by a contractor to recover the cost of paving the railway zone. The franchise of the company being an amended ordinance which it seems the street railway company accepted

provided that the street railway company should keep the space between the rails and a certain space outside each rail at all times in good repair to the satisfaction of the common council. Thereafter it appeared the city passed an ordinance attempting to make the street railway liable to the contractor for its proportion of the total costs of the street improvement and the court held that inasmuch as the street railway company had not consented to or accepted this later ordinance, it was not liable at the suit of the contractor.

The court then gave expression to the dictum that repair did not require re-paving upon the authority of *State ex rel. v. Corrigan*, 85 Mo. 263, and *Chicago v. Sheldon*, 9 Wallace 50.

In *State ex rel. Keith v. Common Council of Michigan City*, 138 Ind. 455, 470, the Supreme Court of Indiana quotes with approval from Elloit on Roads and Streets, as follows:

> "Put the case upon the broad and equitable principle that he who receives the benefit must bear the burden and it becomes at once apparent that the street railroad company should pay the cost of improving the highway."

In the later case of *Columbus S. R. Co. v. Columbus*, 43 Ind. App. 265, the Appellate Court of Indiana, following the authority of *Mayor v. Harlem Bridge R. Co.*, 186 N. Y. 304, holds that a franchise which provides that the portion of the streets between the tracks and on the outside thereof to the limit of two feet

shall be kept in as good repair and condition as the city keeps the other parts thereof, requires the railway company to pave when the city paves the remainder of the street.

In *U. R. E. Co. v. Mayor & Common Council*, 121 Md. 552, the decision is based upon *Baltimore v. Scharf*, 54 Md. 499, where the original holding that to keep in repair did not require repaving was not necessary to the decision of the case.

In the later case the Supreme Court admits that the authorities cited and reasoning advanced in behalf of the contention that the duty to keep the track area in repair includes the duty to pave with new material whenever the city in its progress paves the balance of the street are both of much force but concluded that there are authorities of equal weight to the contrary and that the question was foreclosed by the previous decision.

The fact that there may be cases holding that the franchise duty to repair does not require the street railway company to pave does not meet the situation here for the reason that the franchise of the plaintiff in error is not to *repair* merely but requires the company to keep the railway zone in *proper repair* and in *proper order*.

D. Difference between franchise of 1884 and that of 1892.

Plaintiff in error by making a comparison of the franchise of 1892 with that of the franchise of 1884 attempts to show that the Supreme

Court of Wisconsin erroneously construed the former franchise.

We submit that even if this were true, such erroneous construction would present no Federal question. However, it is submitted that the Supreme Court is correct in its construction of the franchise. The provisions of the earlier franchise granted by the city to a different party from the grantee of the franchise of 1892 are not to be considered in determining the meaning of the provisions of the later franchise.

Oberbeck v. Sportsman's P. & C. A., 17 Mo. App. 310.

As stated by this court when a similar attempt was made to interpret a charter by comparison with another charter:

> "The charter to the bridge is a written instrument which must speak for itself and be interpreted by its own terms."

Charles River Bridge v. Warrenbridge, 11 Pet 36 U. S. 420, 543.

The argument is made by plaintiff in error, quoting from the dissenting opinion of Justice Barnes that when the council adopted the franchise of 1892 it had before it the franchise of 1884. There is no evidence in the case to support this argument and we submit it is not a proper method to adopt in construing a franchise of a street railway company under well recognized doctrine.

Neither is the situation similar to that referred to by plaintiff in error in *Indianapolis and E. R. Co., v. Town of Newcastle*, 87 N. E. (Ind.) 1067, where an ordinance was amended by a subsequent ordinance, the language of the amending ordinance being that the original ordinance "shall be amended to read as follows." With respect to the holding of *Smith v. Eau Claire*, 78 Wis. 457, where the subsequent charter imposed no liability on the city on account of change of grade of the street whereas the prior charter did impose such liability, it should be noted that it is the uniform holding of the Supreme Court of Wisconsin that in the absence of an express statutory provision, there is no liability imposed upon the city for damages due to change of grade of a street so that if the latter charter under consideration in the case cited did not impose liability, it was entirely immaterial what the earlier charter contained on the subject.

Stadler v. Milwaukee, 34 Wis. 98, 102.

Plaintiff in error argued that the franchise of 1892 should be construed on the theory that the city was obtaining an advantage from the fact that this franchise provided for an electric street car system whereas the old franchise contemplated a horse car system. And, that because at one time the former company was in the hands of a receiver that the burden of a horse car system under the old franchise was

greater than that intended to be imposed under the franchise of 1892. There is not any evidence that the former company ever did any permanent improvement such as the work in question which caused it to go into the hands of the receiver and we submit that the fact that it was once in the hands of the receiver is not to be taken into consideration in the construction of the contract.

Furthermore it is apparent that in a city like Madison which has had a growth in population from 10,324 in 1880 to more than 25,000 in 1910, it is apparent that the right to use the streets of the city is a very valuable right and that it would be to the decided advantage of the street railway company to have a franchise authorizing it to use electricity as a motive power instead of the old horse power system. A modern street car system operated by electricity would certainly be a better financial proposition for any company to conduct and operate than the old horse car system and it would be, it seems, to the decided disadvantage of the plaintiff in error to be compelled to continue operating the old horse car system, for a further period of seventeen years which it might have been required to do under the old franchise.

IV.

The Milwaukee Case (151 Wis. 520) as Authority for the Decision.

The plaintiff in error has attempted to show essential distinction between the franchise provision relating to repairs in the Milwaukee case and the provision in the franchise of 1892 relating to repairs. The first difference attempted to be pointed out is that in the Milwaukee case the railway company was required to keep in repair a certain portion of the street and that this provision is not contained in the Madison franchise.

We submit that an examination of the two franchises show that there is no difference whatever on this point. The wording of the Milwaukee franchise is shall keep in repair "all portion of said Walnut Street lying between the outside of the tracks hereby authorized to be laid and one foot therefrom." The Madison franchise provides "that said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair."

The space between the rails of each track and for one foot on the outside must necessarily be a portion of the street and it is rather difficult to see how it can be claimed that there is any difference in the meaning of the language in the two franchises in this respect.

The second difference attempted to be pointed out is that the Milwaukee franchise provides that the repairs must be made of the same material as that of which the street was composed at the time. The fact that the franchise of 1892 does not in words provide that the repairs must be made of the same material of which the street was composed at the time is not of significance in the light of the general rule that the law vests in the municipal authorities the right to determine the type and character of material with which the street shall be repaired.

V.

The street railway company has not met its obligations under the franchise.

The plaintiff in error on page 27 of its brief argues that the railway company has fully met its obligation to repair. It is apparent from the findings of the trial judge with respect to the condition of the railway zone at and prior to July 11, 1910, (Transcript p. 37) that the railway zone was not in repair in any sense of the term. The street railway company requested and the trial judge refused a finding of fact as follows: (Transcript p. 149.)

> "That the portion of University Avenue from Park Street to Mills Street lying between the rails of the defendant and one

foot on the outside thereof was on July 11, 1910, and had been prior thereto, in good repair so as not to interfere with travel over the same."

"That the defendant was at and prior to July 11, 1910, able, ready and willing to keep the portion of University Avenue from Park Street to Charter Street between its rails and one foot on the outside thereof in good repair so as not to interfere with travel over the same."

Plaintiff in error argues, page 27 of its brief, that it is perfectly feasible and practicable to have the railway zone of macadam with the rest of the street of asphalt. In other words, it appears to be the contention of the plaintiff in error in this court, as it was in the state courts, that if its traks were laid on a street having a macadam pavement at the time the tracks were laid, that forever thereafter the street railway company would be discharging its obligation of keeping the railway zone in proper repair and in proper order by continuing macadam in the railway zone, although changed conditions of traffic might have led the city authorities to require the street to be paved with asphalt or some other pavement of a more permanent type and if its tracks were laid upon a street which at the time of the construction of the road was only a dirt street, then by the same argument, the street railway company would fulfill its entire obligation under the contract by forever after maintaining a dirt road between its rails and a foot on the outside thereof. If the street

railway company at all times kept the railway zone in good repair, then it would seem that the city would, under no circumstances be called upon to do any work of construction in that zone, but it can scarcely be thought that the railway company could under its franchise, giving it the valuable right to occupy and use the center of a street, be considered as having discharged its full duty under its franchise by simply attempting to keep in repair a macadam pavement, or other pavement however obsolete, under changed traffic conditions, or by merely putting in more dirt in the railway zone in cases where a dirt street had become out of repair. This argument renders entirely useless the inclusion in the franchise of the words "and said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense," for the reason that by a previous provision of the same section, the roadbed is required to correspond at all times with the actual grade of the street, and to be so laid and maintained that carriages and other vehicles can easily and freely cross the tracks at any and all points.

It is held, as stated on brief of plaintiff in error, p. 13, that where streets are not occupied by a public service company, the duty of keeping them in repair is placed upon the city, but it is likewise held that when one

contracts with a municipal corporation to keep any portion of those streets in repair, in consideration of the license to use them to his benefit in an especial manner, he, in effect, contracts to perform that duty to the public in the place and stead of the municipality.

City of Brooklyn v. Brooklyn City Railroad Co., 47 N. Y. 475, 485.
Benninger v. City of New York, 177 N. Y. 199, 204.

In this connection the following language from the Pennsylvania court is quite appropriate:

> "It was never contemplated that the railway company would continue to exist and perform its corporate functions in a cobblestone age. It was called into being with the view of progress. The duties specified in its charter were imposed with reference to the changes and improved methods of street paving which experience might sanction as superior to and more economical than old methods. In other words, the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."
>
> *Philadelphia v. Ridge Ave. Pass. Ry. Co.*, 143 Pa. St. 444, 472.

And likewise the language of the Court of Appeals of the State of New York quoted by the Supreme Court of Wisconsin in the opinion on this case (Transcript p. 164.)

VI.

The city acted within its authority under the power expressly reserved in the franchise to make reasonable rules and regulations respecting the streets and highways, and consequently, the ordinance of June 11, 1910, does not impair the obligation of the contract nor take the property of the company without due process of law.

By the franchise under which the plaintiff in error is maintaining and operating its street car, permission was granted to construct and maintain the street railway system "subject to all general provisions of statute law now in force and applicable thereto, and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact." (Transcript p. 23.)

The city was authorized to grant a franchise by the provisions of Section 1862 of the Wisconsin Statutes, which is as follows:

> "Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly. Any municipal corporation or county may grant to any such corporation, under what-

ever law formed, or to any person who has the right to construct, maintain and operate street railways, the use, upon such terms as the proper authorities shall determine, of any streets, parkways or bridges within its limits for the purpose of laying single or double tracks and running cars thereon for the carriage of freight and passengers, to be propelled by animals or such other power as shall be agreed on, with all necessary curves, turnouts, switches and other conveniences. Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. Any such grants heretofore made shall not be invalid by reason of any want of power in such municipal corporation to grant, or any such railway corporation or person to take the same; but in such respects are hereby confirmed."

It will be noted that this statute authorized municipal corporations to grant the use of streets for the purpose of constructing and operating street railways, "upon such terms as the proper authorities shall determine." It likewise provides that "every such road shall be constructed upon the most approved plan and subject to such reasonable rules and regulations as the proper municipal authorities may, by ordinance, from time to time prescribe. The supreme court of the state, following the decisions of this court, held that the word "regulations" is one of broad im-

port, and that the term "rules and regulations respecting such streets and highways" did not refer alone to the operation of cars, because it is used conjunctively and that "rules and regulations" respecting "such streets and highways" must be construed to include "rules and regulations" regarding the physical condition of the railway zone. (Transcript p. 167.)

This court has had occasion in a recent case to pass upon the construction of Section 1862 of the Wisconsin Statutes. The case involved the authority of a city to grant a street railway franchise fixing the fares to be charged and the authority of the state to change the fares so fixed. The supreme court of Wisconsin held that the section in question gave no distinct authority to the city to contract away the legislative authority of the state to fix tolls and fares by lowering them if found to be excessive, and that while the term "grant" was used, it was held that the grant was to be on terms such as the municipal authorities might determine, and that this language was more appropriate to the exercise of power by the municipality than to the making of a contract between the parties. This court affirmed the decision of the supreme court of Wisconsin. In speaking of the statute this court said:

> "It authorizes the grant of the use of the streets upon such terms as the proper authorities shall determine, not upon such terms as the parties in interest shall agree to."
>
> *Milwaukee Electric Ry. Co. v. Wisconsin Railroad Commission*, 238 U.S. 174, 181.

It follows under section 1862 of the Wisconsin Statutes as construed by the supreme court of the state and by this court, that when the defendant in error granted, by the franchise of 1892, permission to use its streets for the purpose of constructing and maintaining a street railway system, it had the right to determine upon what terms such use should be granted and to properly reserve to itself the right to make from time to time such reasonable rules and regulations respecting such streets as the common council might enact, as well as to make reasonable rules and regulations respecting the operation of the cars. It will be seen, therefore, that the situation presented in this case is quite different from that dealt with by the New Jersey Court in *Fielders v. North Jersey Street Railway Company*, 68 N. J. L. 343; 353 cited on brief of plaintiff in error at page 32.

With respect to the suggestion of plaintiff in error at p. 33 of its brief that since the decision in the case at bar, three of the seven judges in construing section 1862 have expressed the view that the "reasonable rules and regulations" which the city is authorized to impose from time to time should be limited to simply police regulations, it must be noted that the situation in the case at bar is quite different from that to which reference is made by plaintiff in error, for the reason that at the time of granting the franchise by the express terms of the statute the city is authorized to grant the use of the streets upon such terms as the proper

authorities shall determine, and in granting the franchise of 1892, one of the terms determined upon by the proper authorities was that the city should have the right to thereafter make such reasonable rules and regulations respecting the use of such streets and highways as its common council should from time to time prescribe. So that in the case at bar the court did not have to rely entirely upon section 1862 as it did in the case cited, but had in addition thereto an express reservation in the franchise itself to make reasonable rules and regulations respecting the streets.

In an action between a city and a street railway company to which it had granted a franchise, which involved the right of the city to reduce the rate of fares, the ordinance by its terms reserved to the common council the right to make such further rules, orders, or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railways. This court held that this right to make further rules, orders or regulations could not be held to extend to the alteration of a contract as to the rate of fare for the transportation of passengers, but did hold that this reservation permitted the city to make further rules or regulations pertaining, amongst other things, to all matters incident to the construction and operation of the road, including the repair of the pavement between the tracks.

Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 368, 397.

VII.

The enactment of the ordinance of June 11, 1910, under the reservation contained in the franchise and statute, invaded no contract rights of the plaintiff in error, but dealt only with matters which are the subject of police regulation.

It is well established by the decisions of this court that the police power of the state includes regulations designed to promote public convenience or the general propsperity as well as regulations designed to promote public health, the public morals, or the public safety.

C. B. & R. Ry. v. Drainage Commissioners, 200 U. S. 561, 592.

Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67, 77.

And the matter of the condition of that portion of the street lying between the rails of the street railway company involves the safety of people traveling across or along the street quite as much as many other matters which are universally conceded to fall within the scope of the police power, and this court has sustained the validity of an ordinance requiring a railway company to fill the portion of the street included between the rails of its tracks on the ground that it had to do with the safety of persons crossing the tracks midway between the respective street blocks.

Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 561.

In a case decided by the Supreme Court of Michigan it appeared that the franchise required the street railway zone "to be paved with cobblestones in the same manner as the balance of the track is now paved." The city determined to pave the streets upon which the street railway company had its tracks with brick upon a concrete foundation, and served notice upon the railway company to likewise improve the railway zone, and the railway company refused so to do and contended that the requirement as to paving with brick upon a concrete foundation would impair the obligation of the contract. The court held that the requirement to pave between the rails similar to the balance of the street and to cut the ties projecting beyond the stringers was not an unreasonable and unnecessary exercise of the police power. After stating that a city in granting a street railway franchise does not and cannot surrender or circumscribe its right to the exercise of general police powers and that to hold otherwise would render it impossible during the life of the franchise to make the necessary changes required for the public use and safety, the court said:

> "We are convinced that the trend of the authorities and the attitude of this court is favorable to the protection of the rights of the public in the reasonable and necessary exercise of such powers, and hold in the instant case that these grants to use the public streets were accepted upon the implied condition that they should be held subject to

> such power, the necessity for the exercise of which is to be determined by the municipal authorities. In the exercise of its powers reserved to it to maintain its streets in a safe condition for the public use, the municipality is the judge of the necessity for repairing the pavement and repaving its streets, and its right to do so cannot be surrendered; and it may impose such reasonable requirements upon the grantees of franchises given to street railways as to conform with changes which may be determined to be necessary and essential for the protection of the public."
>
> *City of Detroit v. United Ry.*, 172 Mich. 496, 138 N. W., Rep. 215.

The Courts of California also hold that a city may under the police power enact reasonable rules and regulations respecting the paving of that portion of the street occupied by a street railway company, and that in the absence of anything to the contrary, the court must presume that a municipal ordinance requiring the street railway company to pave the railway zone was adopted to promote the safety of the streets and the security of the public. The franchise in question contained a provision that it was granted "subject to all laws or municipal regulations now in force or that may be hereafter enacted relating to the control or use, digging in or occupying of the public streets." The court held that this provision of the franchise authorized the city to enact the subsequent ordinance requiring paving, and in the course of the opinion said:

"Of course regardless of such agreement, it is well settled that the municipality cannot abdicate its functions or by contract divest itself of power to control the streets for the benefit of the public. The improvement, regulation, and control of the highways within a municipality call for the exercise of a delegated governmental power, a function which the municipality itself, neither by ordinance nor by contract, can surrender or impair."

Town of St. Helena v. San Francisco N. & C. Ry., 24 Cal. App. 71, 140 Pac. Reporter 600.

In a Connecticut case it appeared that the franchise of the street railway company required the company to keep so much of the street or highway as is included within its tracks and a space of two feet on the outer side of the outer rails thereof in repair to the satisfaction of the authorities of the city, town or borough which is bound by law to maintain such street or highway.

By a subsequent act of the legislature of 1895, a street railway company was required to pay the cost of paving the full length of its line of track and nine feet wide for each and every line of track. The street railway company claimed that under a later act of 1899 it was relieved from a portion of the amount so assessed. The court held, contrary to the contention of the street railway company, and the latter then contended that the act of 1895 was unconstitutional and void.

The supreme court of Connecticut sustained the validity of the law upon two grounds: (1st) as a valid exercise of the police power, and (2d) as under the reserve power to amend, alter or repeal the street railway's charter.

Speaking of the police power the court said:

> "In the exercise of this power of highway regulation, the state may of itself and directly, or through its authorized municipal or other agencies, decide what repair or improvement public comfort or safety requires, and determine upon whom the burden thereof should reasonably fall."
>
> *Fair Haven & W. R. Co. v. New Haven*, 75 Conn. 442, 451.

This case was, following some subsequent litigation in the state courts, brought to this court. This court held that if either ground of the judgment was tenable, it must be affirmed, and sustained the judgment on the ground that the statute of 1895 was a proper burden to place on the street railway company within the limitations upon the reserve power of the state. This court held that before granting the franchise the state could have, and reasonably could have put upon the company the duty of paving as well as repairing, and that such requirement would have been consistent with the object of the grant.

> *Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379.

This court has frequently sustained laws and ordinances requiring railway companies

to construct viaducts over and across streets at the sole expense of the railroad company in the interests of public safety. In those cases, as in others, it is held that means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interests of public safety which the legislature has duly enacted.

Mo. Pac. Ry. Co. v. Omaha, 235 U. S. 121, 127.
Chicago &c. R. R. v. Nebraska, 170 U. S. 57.
Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis, 232 U. S. 430.

A street railway company was given by its franchise the right "to lay down and construct double iron railway tracks for the purpose of its business * * * on Lexington street westwardly to Charles street from North street." By a subsequent ordinance the city of Baltimore revoked the right to maintain two tracks on Lexington street between North street and Charles street and prohibited the maintaining of more than a single railway track upon that portion of Lexington street. It appeared that by statute the mayor and city council of Baltimore were given the power to regulate the use of streets by railway com-

panies. This court held that the change from a double track to a single track upon the portion of the street named, did not substantially change the terms of the contract, if there was one, between the city and the railroad, and was a reasonable regulation concerning the use of the street by the railroad company.

In the course of the opinion, the following is quoted with approval from a prior decision in regard to the power of regulation of a street of a city:

> "The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. * * * And so it is only a matter of regulation of use when the city grants to the Telegraph Company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been put to in opening and improving the street."

It is further held in this same case that the power of regulation is not exhausted by being once exercised, and that the power may be exercised as often as and whenever the common council may think proper.

Baltimore v. Baltimore Transit Co., 166 U. S. 673, 684.

Numerous other cases might be cited illustrating the extent of the police power, but

it is believed that the foregoing cited cases suffice to show that the condition of the space in a street between the tracks of a street railway company is a proper subject for police regulation, and that ordinances enacted for the improvement of the condition of that portion of the street are enacted in the interest of public convenience and public safety. Furthermore, it is confidently urged that a regulation requiring a street railway company to improve the railway zone in the same manner as the city improves the rest of the street is a reasonable regulation, and not harsh, oppressive or unjust, and in view of the fact that in the franchise under consideration the city expressly reserved to itself the right to make reasonable rules and regulations respecting the streets and highways from time to time, it is submitted that under the authorities, the city acted entirely within its rights when by the ordinance of June 11, 1910, it ordered and directed the plaintiff in error to improve the railway zone on University Avenue in the same manner as regards the surface, and in the same manner or some other manner equally as good as regards the foundation, as the city improved the remainder of the street.

It is respectfullysubmitted that the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,
WILLIAM RYAN.
Attorney for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. [redacted] 260

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error,

vs.

CITY OF MADISON,

Defendant in Error.

Brief of Argument of Plaintiff in Error in opposition to motion of Defendant in Error to Dismiss the Writ of Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 653

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error,

vs.

CITY OF MADISON,

Defendant in Error.

Brief of Argument of Plaintiff in Error in opposition to motion of Defendant in Error to Dismiss the Writ of Error.

STATEMENT.

It will be unnecessary to repeat the facts contained in the statement of the attorney for defendant in error, or to set forth in this brief again the franchise printed in the brief of defendant in error (pp. 4–12), or the ordinance of June 11, 1910, id. (pp. 12–14); or the stipulation id. (pp. 14–17).

ARGUMENT.

I.

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution.

II.

The passage of the ordinance of June 11, 1910, was such state legislation as impaired the obligation of the contract and raised a federal question when properly presented in the record.

III.

The State Court by its decision gives effect to the ordinance.

ARGUMENT.

I.

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution

Atlantic Coast Line v. Goldsboro, 232 U. S. 549, 555.
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148.
City Ry. Co. v. Citizens Ry. Co., 166 U. S. 557, 563.
New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 350.
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Hamilton Gas Light Co. v. City, 146 U. S. 258, 266.
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N. P. Ry. Co. v. Duluth, 208 U. S. 583, 590.
Mercantile Trust Co. v. Columbus, 203 U. S. 311, 320.
Vicksburg Water Works Co. v. Vicksburg, 185 U. S. 65, 81.
Southwest, etc. Lt. Co. v. City of Joplin, 101 Fed. 23.

II.

The passage of the ordinance of June 11, 1910, was such state legislation as impaired the obligation of the contract and raised a federal question when properly presented in the record.

If the Railway Company is not obligated by the terms of its contract to do the paving, then the ordinance certainly impairs the contract. Whether or not the ordinance is authorized by the contract involves the construction of the contract.

Whether the ordinance is authorized by the general laws of the state involves the construction of such law.

The State Court therefore in construing the franchise contract of 1892 which is claimed to authorize the ordinance of June 11, 1910 gave effect to this ordinance.

The State Court also by its decision holding the Company liable for the payment gave effect to the ordinance.

The State Court, however, specifically bases its decision on a conclusion that the terms of the franchise authorize the ordinance, and then supports this decision by holding that the ordinance is also authorized by the state law.

The Federal Court is, however, not bound by the mere phraseology or language of the State Court in determining whether a federal question is involved. Otherwise the State Court

by its language might deprive the Federal Court of jurisdiction.

The Federal Court will look to see whether the decision gives effect to subsequent legislation. To argue that because the State Court construed the contract and held that by its terms the railway company was obligated to do the paving and therefore the ordinance was proper, does not involve a federal question is to beg the question.

The rule is stated in *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 147.

> "Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent state legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the state court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose."

Houston & Texas C. R. Co. v. Texas, 177 U. S. 66, 74, 77.

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 147.

McCullough v. Virginia, 172 U. S. 104, 117.

University v. People, 99 U. S. 309, 313.

Hall Hall Co 172 U.S. 1

"The legal existence of the contract itself and its proper construction, is necessarily involved in the question of the alleged impairment of the obligation thereof."

Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 495.

III

The State Court by its decision gives effect to the ordinance.

Bridge Proprietors v. Hoboken Co., 1 Wall, 116, 140–147.

Houston & Texas Central Ry. Co. v. Texas, 177 U. S. 66, 74–77.

McCullough v. Virginia, 172 U. S. 102, 116.

University v. People, 99 U. S. 309, 320.

It will be observed that the franchise was passed in 1892. From that time until June, 1910, the question of the construction of that franchise had not been determined.

On June 11, 1910, the issue was sharply raised by the ordinance in which the city railway company was:

"Hereby directed and ordered to reconstruct and pave its roadbed on that portion of University Avenue between Charter and Park street in accordance with the city engineer's plans and specifications for said work; such plans and specifications being hereto attached and made a part hereof; or in accordance with such other plans for a crushed stone, concrete or other equally good

foundation for its ties and a suitable asphalt surfacing for its roadbed and a foot on the outside of each rail so that when completed said road bed and the strip one foot outside of each rail shall correspond with the remainder of the asphalt improvement on said portion of said avenue."

The work was ordered to be completed not later than Oct. 15, 1910. The ordinance also provided:

"Section 3. Should said railway company neglect or refuse to comply with the requirements of this ordinance said company shall be liable to a fine or penalty not exceeding fifty ($50.00) dollars per day for each day the said company neglects or refuses to construct said road-bed according to the provisions of this ordinance, after the time herein specified, shall constitute a separate offense."

Even if by the franchise the Street Railway Company was obligated to pave the strip, the franchise was not self executing. In that event it rested with the City to prescribe the time and the manner in which the work should be done, and to fix penalties for non-performance.

This was what the city attempted to do by the ordinance in question, which contained elaborate plans and specifications and provided severe penalties.

The Street Railway as the record shows has never accepted the construction placed on the franchise by the City, but on the contrary has opposed it and promptly raised the ques-

tion upon the attempt of the City to enforce the subsequent legislation or ordinance.

It was the threat of heavy penalties which compelled the Company to enter into vexatious litigation in defending actions for penalties or to make the stipulation to abide by the decision of the Court of Last Resort.

The only order or direction from the City for the doing of the work was the ordinance of June 11, 1910. The plans and specifications referred to in the stipulation were also pursuant to said ordinance.

It will thus be seen that validity of the subsequent ordinance or legislation was the vital issue in the case. Of course the City claimed that this ordinance was authorized by the franchise of 1892 and the decision of the Wisconsin Supreme Court fully discussed the franchise provisions. *But the single question at issue was whether the later ordinance impaired the contract of* 1892 *contained in the franchise.*

The complaint set forth the ordinance of June 11, 1910, in full and the defendant's neglect to obey it.

The answer admitted the passage of the ordinance and its failure to comply with its tenor, and among other things alleged:

> "Further answering said complaint defendant alleges that its said franchise granted by the plaintiff city on June 10, 1892, and under which this defendant is now operating its street railway system in the plaintiff city is a contract between the plaintiff city and this defendant under the rights and benefits

of which defendant is protected not only by the laws and constitution of the State of Wisconsin, but by the laws and the constitution of the United States. To hold notwithstanding the expressed terms of said franchise or contract that the defendant company should be compelled to pay the cost of said improvement referred to in the complaint would be to deny to the defendant equal protection of the laws and constitution of the United States, and would be taking from the defendant property and contract rights without due process of law contrary to the provisions of the Constitution of the United States."

The stipulation provided among other things:

"It being understood also that the city may institute such suit as soon as any part of said work has been paid for by the city and no claim shall be made that such suit is prematurely commenced so that the issue may be tried in the October term of said court, if possible, so that an appeal may be taken to the supreme court *and to the United States Supreme Court should either party so desire.*"

It is thus apparent that the questions involved were both the construction of the franchise and whether it was broken or impaired by the later ordinance.

In the Supreme Court of Wisconsin counsel for the Railway Company argued in their brief and orally that the agreement contained in the franchise could not be altered by the later ordinance without the consent of the Company.

In various ways the Wisconsin Supreme Court passed directly upon the validity of the second ordinance.

The Court said:

> "The Common Council acted within its power in providing for such pavement and then ordered defendant to conform thereto."
>
> *Madison vs. So. Wis. R. R. Co.*, 156 Wis. 368.

Again on page 381 the Court said:

> "It did not, merely, notify appellant to put the street in 'proper repair' as if seeking to arouse defendant's duty in that regard. It adopted, in the most formal way, an ordinance, in effect, ordering appellant to make the improvement. That pretty clearly was thought to be warranted by the condition of the franchise making it dependable upon conforming, in respect to the streets and highways, to 'such reasonable rules and regulation' in respect thereto 'as the said council may from time to time enact.'"

And the Court held that the ordinance was such a rule or regulation as under the franchise the City had the right to make and that the ordinance violated no contract right.

The Federal question was raised the first opportunity, was recognized in the stipulation and has been insisted upon throughout the entire proceedings.

For the purpose of this motion the Court must assume that the Railway Company is correct in its contention that it is not obliged by the terms of its franchise to pave. With

this assumption the ordinance of June 11, 1910, plainly impairs the contract.

Although not expressly so held, the above rule was in effect applied in Houston, etc., R. R. Co. vs. Texas, 177 U. S. 66. At page 74 the Court says:

> "The claim on the part of the defendant in error, the plaintiff below, is that the State Court decided the case under the provisions of the state constitution only, and without reference to the act of 1870, which the plaintiff in error (the Ry. Co.) alleges to be an impairment of the contract set up by it in the pleadings. Although the state court held that the payments in dispute were made by means of State Treasury warrants issued to circulate as money, which were therefore void as in violation of the constitution of the state and that the delivery of the warrants by the Company, amounted to no payment whatever, *the question still remains whether by that decision any effect was given to the act of 1870.*"

In considering the question as to whether there was an impairment of the contract, and thus a federal question, the Court must do so in the light of the procedure which has been followed in the case, namely, the passing of the ordinance directing the plaintiff to do the paving, and imposing a heavy penalty for failure to comply with it, the stipulation and the trial. The Court cannot speculate as to the construction which the state court might have placed upon the provisions of this franchise contract had no subsequent ordi-

nance been passed and the question raised in some other proceeding.

It is conceded that the franchise of 1892 is a contract. It is also conceded that on June 11, 1910, the City of Madison passed an ordinance directing and ordering the Railway Company to pave a portion of the street. It is not disputed that the Railway Company from the very beginning and at the first opprtunity contended that it could not be compelled to do the paving ordered, and directed to be done, by the ordinance of June 11, 1910, because it was exempted from such obligation by the terms of the franchise contract of 1892.

If the contention of the Railway Company is correct then the franchise contract is plainly impaired by the subsequent ordinance, and a federal question is presented for the consideration of this court.

It is therefore respectfully submitted that the motion to dismiss should be denied.

BURR W. JONES
E. J. B. SCHUBRING
Attorneys for Southern Wisconsin Railway Company. Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 260

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error,

vs.

CITY OF MADISON,

Defendant in Error.

In Error to the Supreme Court of the State of Wisconsin.

MOTION OF THE CITY OF MADISON, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR.

WILLIAM RUBL,

City Attorney,

Attorney for Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 653

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error,

vs.

CITY OF MADISON,

Defendant in Error.

Motion of Defendant in Error, City of Madison to Dismiss the Writ of Error, and the Brief of Argument in Support thereof.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the City of Madison, defendant in error, and moves the court to dismiss the writ of error sued out by the plaintiff in error, Southern Wisconsin Railway Company, in the above entitled cause from the judgment of the Supreme Court of the State of Wisconsin entered on the 17th day of March, 1914, on the ground that this court has no jurisdiction to review the judgment complained of herein.

STATEMENT.

This action was brought in the Circuit Court for Dane County, Wisconsin, by the City of Madison, defendant in error, to recover of the Southern Wisconsin Railway Company the cost of paving with asphalt the portion of University avenue in said city from Park street to Charter street which is included between the rails of defendant's tracks and one foot on the outside thereof.

The action is based on the claim that the Southern Wisconsin Railway Company under its franchise is required to pave the portion of the street occupied by its rails and one foot immediately outside thereof when the street needs to be paved and the city orders the work done. The city ordered University avenue outside the railway zone improved with asphalt on a concrete foundation under the provisions of the state law and ordered the Street Railway Company to likewise improve the railway zone. The Railway Company denied that it was under any obligation to pave between its tracks and one foot on the outside thereof, and a stipulation was entered into between the railway company and the city whereby the city did the work of improving the railway zone with the agreement that thereafter an action might be brought by the city to recover the costs of the improvement of that portion of the street lying between the rails of the Street Railway Company's tracks and one foot on the outside thereof.

The Southern Wisconsin Railway Company is a street railway corporation under the laws of the State of Wisconsin, and on the 8th day of March,

1884, the city of Madison granted to the Madison Street Railway Company, a franchise to lay and maintain a street railway line in said city, and the Southern Wisconsin Railway Company succeeded to all rights of the Madison Street Railway Company under said franchise of 1884.

On June 10, 1892, the city of Madison granted to the Madison City Railway Company a franchise to maintain and operate a street railway system in said city and the Southern Wisconsin Railway Company succeeded to all the rights of the Madison City Railway Company under the franchise of 1892, and claimed that the franchise of 1884 had by its own terms expired.

The Circuit Court for Dane County determined the rights and obligations of the parties in the case under the assumption that they were fixed by the franchise of 1892.

The Supreme Court of the state held that the franchise of 1884 was repealed by the franchise of 1892 and that the rights and duties of the Street Railway Company with respect to paving the railway zone should be determined under the terms of the franchise of 1892.

The Street Railway Company in its answer claimed that the franchise of 1884 was repealed and that the franchise of June 10, 1892, was the only subsisting street railway franchise between the city and the railway company at the time the railway company was ordered to pave the portion of University Avenue in 1910.

It will thus be seen that both the trial court and the supreme court of the state held with the Street Railway Company upon its contention that the

only franchise existing between the Street Railway Company and the city was the franchise of 1892, and then proceeded to a determination of the issues and rights of the parties under the franchise of 1892. Section 3 of said franchise contains the provision relating to the repair and maintenance of streets.

The franchise of 1892 is as follows:

"An Ordinance granting the use of the streets and bridges for the operation of an electric railway to the Madison City Railway Company.

THE COMMON COUNCIL OF THE CITY OF MADISON DO ORDAIN AS FOLLOWS:

Section 1. Be it ordained and enacted by the council of the city of Madison assembled, and it is hereby ordained that permission is hereby granted to the Madison City Railway Company, its successors and assigns, to enter upon and to construct, maintain and operate a single or double track railway, with the necessary turnouts and switches, upon the streets, highways and bridges in said city, upon the express condition that the said company shall construct and have in operation within four months a line of railway extending from the university buildings via University Avenue, Park street, State street, Carroll street, Main street, King street, Wilson street, Blair street, Williamson street, Jenifer street, to Baldwin street, and also a line from the junction of Bedford street and Main street on Main street via Carroll street, Mifflin street, Hamilton street, Johnson street, to Baldwin street, subject to all general provisions of statute law now in force and applicable thereto,

and to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact.

Section 2. Said Madison City Railway Company, its successors and assigns, are hereby granted the right to use, upon the whole or any portion of its tracks, as the same are now or may hereafter be authorized and constructed, electricity as a motive power supplied to the cars by means of a single overhead trolley-wire, the electrical circuit being completed by the rails of the road, suitably connected at their ends, or connected with a supplementary ground wire. And for this purpose said company, its successors and assigns, are hereby expressly authorized and empowered to lay and connect said ground circuit as aforesaid, and to erect and maintain, in and along any and all of the public streets and highways upon which the tracks of said company are hereby or may in the future be, authorized and constructed, such posts, brackets, wires and fixtures as may be required to support and maintain the overhead trolley-wire. For such support and maintenance, either horizontal crosswires extending across the street, or bracket arms projecting over the track, as said company may deem more suitable, may be employed. All posts or poles used in such construction shall be number one selected cedar twenty-eight (28) feet in length with not less than seven (7) inch tops, excepting that on the streets around the Capitol building, and within a radius of one-fourth of a mile therefrom, they shall be ornamental iron poles.

In all cases of single track construction the poles shall be placed in or adjacent to the line of the curb of the sidewalk, or otherwise in such manner as not unreasonably to impede public travel, and set at least six feet in the ground; and in all cases of double track construction where the tracks are at least six feet apart, the poles shall be placed in the street between such double tracks and set at such a depth in the ground as to make their support substantial and adequate. All poles shall be kept painted, those of wood the first six feet next to the ground line to be black and the balance white, and those of iron shall be all black, or such colors as the council may determine; and the cross wires, or brackets, as the case may be, for the support of the trolley-wire, shall be attached to said poles at such height as to maintain said trolley-wire at every point not less than eighteen (18) feet above the surface of the street. All such posts, brackets, wires and fixtures shall be maintained by said company at all times in good order and condition.

Animal, or other motive power, except steam, may be used, jointly with electrical power, in the general operation of said railway, during such time or times as the operation thereof by electricity shall be interrupted or suspended by reason of accident to the electrical equipment, such animal or other power alone may be employed in the propulsion of cars over the whole or any portion of the company's tracks.

Section 3. The authority and permission herein granted, are subject to the following terms and restrictions:

(A) The track shall be of the standard gauge, four feet and eight and one-half inches, and within a radius of one and one-quarter miles from the center of the Capitol park, shall be constructed with "T" rail of fifty pounds to the yard, laid on ties six by eight inches, placed two feet apart from centers, in a good and substantial manner, upon or as near the middle of the streets as may be practicable, so as to obviate as far as possible any obstruction or hindrance to other proper use of said streets and bridges; and outside of said limit of one and one-quarter miles the weight of "T" rail shall not be less than 35 pounds to the yard, laid on ties two feet apart from centers. The cars to be run on said railway, and other equipments, shall be of the best class and style in use in such railways. And the roadbed shall at all times correspond with the actual grade of the street and shall be so laid and maintained that carriages and other vehicles can easily and freely cross said track at any and all points. When snow shall be thrown from the railway tracks it shall be leveled or disposed of by said company so as not to be an obstruction to travel on the street. And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense.

(B) It shall be the duty of said company to repair any and all damages done to the streets, macadamizing, curbs, cross or sidewalks, gutters or other public or private property by the construction or repairing of the tracks along the

streets as herein provided for; and further, to protect and save harmless the City of Madison against all claims for damages arising from the construction, operation or management of the railway provided for herein.

(C) The city reserves the power to impose a license fee not to exceed five ($5) dollars per year for each motor car actually run at the expiration of five years after the passage of this ordinance.

(D) The rate of fare shall be five (5) cents for one continuous ride in any one direction, and the said company, its successors and assigns, shall in no case charge or collect from any passenger more than five (5) cents for one continuous ride between any two points within the city limits; said continuous ride shall include transfer at junction points, provided the passengers so transferred shall take the first car leaving after their arrival in the direction in which they may wish to go. This section is not to be construed to include a round trip, but merely a single trip from one point to another by the shortest and most direct route.

(E) The city shall not be liable to said company for any damages that may be occasioned by the breakage of any gas or water pipes or other defects in its streets or highways, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes or electric wires or the necessary repairing of the same, or from the improvement or repairing of any street. The city further reserves to itself and to all persons lawfully authorized to do such work in its streets the right to take up and remove the rails and structure of said road whenever it shall be

necessary for the repairs or improvements of the streets or for laying water or gas pipes or sewers or electric wires, or for other public purposes on the streets on which such rails may be laid; and such repairs, improvements or works shall be made by the city or persons thereto authorized without unnecessary delay, and doing no unnecessary damage to said track, and upon the change or alteration of any grade, the said company, its successors or assigns shall, at its own cost or expense, promptly raise or lower its track or tracks so as to conform to such grade as changed.

(F) Said city railway shall be used exclusively as a passenger railway, except that passengers thereon may, without extra charge, carry a reasonable amount of hand luggage, and said company may transport thereon all materials for the construction of its road.

(G) The rights and privileges herein granted shall be for a period of forty years from the passage of this ordinance,— the first twenty years of which shall be exclusive,—provided, however, that the common council may at any time designate any other line of railway in said city as a line demanded by the public necessities. And in case said company, being notified of such designation, shall not within such reasonable time as shall be fixed by the common council construct and put in operation such line, then the common council may grant to any other company or person the exclusive right to construct and operate a street railway, in the street or streets forming the line so designated, but the said city shall not require the railway company or grant to any

other company or person the right to build and equip a railway that may run parallel within twelve hundred (1,200) feet of its line or lines which it now has or may hereafter construct for the purpose of carrying passengers.

(H) When it shall be necessary for any person or persons to move across any of the streets or alleys occupied by said company, its successors or assigns, any house or other building of such height or size as to interfere with any of the poles or wires of said company, its successors or assigns, erected or maintained under this ordinance, the said company, its successors or assigns, shall, upon receiving at least twenty-four hours' notice in writing thereof, and at the expense of the owner of such building, temporarily remove its poles and wires so far as necessary to allow the passage of such house or other buildings for a reasonable period of time, not exceeding five (5) hours, and the said company, its successors or assigns, shall be liable for any damages caused by its failure to comply with this provision; provided, that said company shall not be required to keep its poles and wires out of their normal position at any time or times other than between the hours of twelve (12) o'clock midnight and five (5) o'clock a. m., and provided further that the route selected for removing such house or other building shall first be approved by the city engineer.

Section 4. Should said railway company neglect or refuse to comply with the provisions of this ordinance, or with any regulation imposed by the council, under the powers herein reserved, said company shall be liable to a fine or penalty not

exceeding fifty ($50) dollars for any one offense, to be recovered by action as other penalties for violation of an ordinance, but the provision of this section shall not apply to the forfeitures under section one hereof.

Section 5. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken by any car, such team or vehicle shall give way to such car; nor shall any person wilfully obstruct, hinder or interfere with any of such railway cars by placing, driving or stopping any teams, vehicle or other obstacle in, upon or near the track of said railway after being notified by ringing the car bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall upon conviction thereof be punished by a fine not exceeding ten ($10) dollars and may be imprisoned in the county jail until said fine is paid, not exceeding thirty days.

Section 6. This ordinance shall be void and all rights granted hereunder shall cease and be of no effect unless said company shall file a written acceptance of the same with the city clerk within sixty days from the passage hereof.

Section 7. All ordinances or portions thereof heretofore adopted which conflict with the provisions of this ordinance are hereby repealed.

Section 8. This ordinance shall take effect upon its passage and publication.

Approved June 10th, A. D. 1892.

WM. H. ROGERS, Mayor.

Notice is hereby given that the foregoing ordinance was passed by the common council of the City of Madison, Wisconsin, on the 10th day of June, A. D. 1892.

O. S. NORSMAN, City Clerk.

In 1910, the City of Madison ordered University avenue, between Charter street and Park street, permanently improved with asphalt upon a concrete foundation and requested the Southern Wisconsin Railway Company to likewise improve the portion of said tracks between its rails and one foot on each side thereof and the railway company refused so to do.

On the 11th day of June, 1910, the city duly adopted an ordinance ordering the defendant to pave its right of way on said portion of said street with asphalt and gave notice thereof to the Street Railway Company. Said ordinance is as follows:

"WHEREAS, the City of Madison has heretofore ordered the paving of University Avenue from Charter street to Francis street, with asphalt, and,

WHEREAS, the Southern Wisconsin Railway Company occupies with its railway tracks and roadbed the central portion of that part of said avenue between Charter and Park street, and,

WHEREAS, the roadbed as now constructed would not be in keeping with or correspond with the remainder of said portion of said avenue, as so improved with asphalt pavement, or be as substantial or enduring, and would soon damage such pavement.

Now, therefore, the common council of the City of Madison do ordain as follows:

Section 1. The Southern Wisconsin Railway Company be and is hereby directed and ordered to reconstruct and pave its roadbed on that portion of University avenue between Charter and Park street in accordance with the city engineer's plans and specifications for said work; such plans and specifications being hereto attached and made a part hereof; or in accordance with such other plans for a crushed stone, concrete or other equally good foundation for its ties and a suitable asphalt surfacing for its roadbed and a foot on the outside of each rail so that when completed said road bed and the strip one foot outside of each rail shall correspond with the remainder of the asphalt improvement on said portion of said avenue.

Section 2. The contract for the asphalting and otherwise improving University avenue between Charter street and Francis street having been let, and the work having been commenced, it is hereby ordered that said Southern Wisconsin Railway Company shall, without delay, proceed with its part of the work for the improvement of said avenue, as provided in the preceding section, and shall have the work completed not later than October 15, 1910.

Section 3. Should said railway company neglect or refuse to comply with the requirements of this ordinance said company shall be liable to a fine or penalty not exceeding fifty ($50.00) dollars per day for each day the said company neglects or refuses to construct said road bed according to the provisions of this ordinance, after the time herein specified, shall constitute a separate offense.

Section 4. This ordinance shall take effect and be in force from and after its passage and publication."

The street railway company having neglected and refused to improve the portion of the street occupied by its rails and one foot on each side thereof and it being desired that the work of improvement should be done without delay, the following stipulation and agreement was made and entered into between the city and the street railway company.

"Whereas, the city of Madison some time since decided to improve with asphalt that portion of University Avenue between Park street and Charter street in the city of Madison and has let the contract therefor, and the contractor is now at work and his work has now proceeded as far as the railway track of the street railway at Park street, and,

Whereas, the Southern Wisconsin Railway Company occupies the central portion of that portion of said avenue from Park street to Charter street with its line of street railway, and,

Whereas, the city claims it necessary that the railway strip be improved in substantially the same manner as the remainder of the street in so far as the concrete foundation and asphalt top are concerned, and the city claims it is very necessary that said work should be done at the same time, and,

Whereas, the city of Madison insists that it is the duty of the Railway Company, under its franchise and the laws of Wisconsin, to grade, pave and otherwise to improve that portion of said

avenue between its rails, and one foot on the outside of each rail to correspond generally with the proposed improvement of the avenue, and has heretofore ordered and directed the Railway Company, that it do such work as therein directed, and,

Whereas, the Street Railway Company insists that such is not its duty and on demand by the city has refused and still refuses to do said portion of said work, except to grade.

Now therefore, to the end that the work of grading, paving and otherwise improving that portion of University avenue from Park street to Charter street, may not be delayed, and that the work may all be done at one time, thus insuring much better results, and to the end that the legal rights and duties of the city and of the Railway Company, in case of such improvement, may be finally determined and with the least delay.

It is hereby stipulated and agreed, 1. That the city of Madison shall order and cause the improvement company to which the contract for the paving and improvement of said avenue has been let, to pave that portion of University avenue between Park street and Charter street, between the rails of the Southern Wisconsin Railway Company and one foot on the outside of each rail thereof in accordance with the plans and specifications hereto annexed and made a part hereof, marked "Exhibit A," and under the supervision of the engineer of said Railway Company.

That the cost of such work will be in the first instance paid by the city of Madison with the speci-

fic understanding and agreement, however, that it is the intention hereof that the party charged with the duty of doing said work shall pay therefor and that the right and duty of the city and said railway company in the premises shall be determined and that on or before the completion of said work the city of Madison shall bring suit if it so elects in the Dane circuit court to recover the amount so paid for the paving and improving of said railway strip by the city.

It being understood also that the city may institute such suit as soon as any part of said work has been paid for by the city and no claim shall be made that such suit is prematurely commenced so that the issue may be tried in the October term of said court, if possible, so that an appeal may be taken to the supreme court and to the United States supreme court should either party so desire.

3. That said action may be a simple civil action for the recovery of the sums so paid by the city and that any and all questions respecting the nature, kind or form of said action, the regularity of the letting of the contract for the improvement of the avenue or the ordering the work in question and the form or sufficiency of the proceedings of the city, looking to the improvement of the railway strip and the cost and nature of the work, shall be waived to the end that there may be prompt determination respecting the merits of the matter in issue.

4. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave that portion of the avenue herein referred to as occu-

pied by its track, that the street railway company shall immediately repay to the city the amount paid by the city for said work on said right of way together with interest from the date of payment thereof by the city to the contractor.

5. It is further understood and agreed that should the court of last resort decide that it is the duty of the street railway company to pave the strip in question that the city will not insist on its claim for any penalty for the failure of the railway company to have completed said work within the time specified.

This agreement shall bind the parties hereto, their successors and assigns.

Dated this 20th day of August, A D. 1910.

(Signed.) JOHN A. AYLWARD.
JONES & SCHUBRING,
Attorneys for Southern Wisconsin Railway Co.

In pursuance of said stipulation, the city caused the Paving Company having the contract for the improvement for the remainder of the street to likewise improve the railway zone and paid said contractor the cost of improving the railway zone, being the sum of $3, 912. 24, which sum was paid by the city to the contractor on the 14th day of October, 1910.

The city then brought this action to recover said sum from the railway company and judgment was rendered in the circuit court for Dane county in favor of the city and against the railway company for said sum with interest and costs, which judgment was affirmed by the supreme court of the state of Wisconsin.

ARGUMENT.

NO FEDERAL QUESTION IS INVOLVED.

As shown by the record, the trial court decided in favor of recovery by the city upon the assumption that the franchise of 1892 controlled. The supreme court of the state decided that the franchise of 1892 repealed the franchise of 1884.

It will thus be seen that the state courts held with the street railway company in its claim that the franchise of 1892 was the only existing franchise between the city and the street railway company.

The decision of the supreme court of Wisconsin in this matter is reported in *Madison v. Southern Wis. R. Co.*, 156 Wis. 352. The supreme court held that the franchise of 1892 which required the street railway company to keep the railway zone "in proper repair so as not to interfere with travel over the same and keep the same in proper order and cleanliness at its own expense" required the railway company to pave or repave the railway zone when the same was necessary. The court rejected the ruling thought of the decisions which hold that a requirement of a street car company to keep its railway zone in "good" or in a "proper" "state of repair" does not under any circumstances include paving or repaving, and adopted the ruling laid down in a previous case in Wisconsin that the repair provision of the franchise above quoted required the railway company to pave the railway zone, where the proper condition of the streets, under all the circumstances, requires paving or repaving. It is thus

apparent that the court construed the franchise as a whole and the particular section therein with respect to maintaining the railway zone in proper repair and in proper order as requiring the street railway company when the old pavements became worn out to repave the railway zone. The decision of the court is based squarely upon a construction of the franchise of 1892. After disposing of the case upon the foregoing basis the court sets forth in its opinion a second ground for the decision which is more fully referred to later.

It is apparent that there is no federal question presented by this case. The judgment is a result of the construction by the court of a contract between the city and the street railway company.

The defendant in its answer alleges that to hold that the street railway company should be compelled to pay the costs of this street improvement would be to deny to the street railway company equal protection of the laws and Constitution of the United States and would be taking from it property and contract rights without due process of law, contrary to the provisions of the Constitution of the United States, and in its brief before the supreme court of the state of Wisconsin argued that to hold the street railway liable for the cost of the pavement would be a violation of section 10 of article 1 of the Constitution of the United States.

Section 10 of Article 1 of the Constitution of the United States provides that no state shall pass any law impairing the obligation of contracts. It is well settled by numerous decisions of this court that a contract can only be impaired within the

meaning of this clause in the constitution, and so as to give this court jurisdiction on a writ of error to a state court, by some ~~con~~sequent statute of the state or ordinance legislative in character, which has been upheld or effect given it by the state court. This constitutional inhibition applies only to legislative enactments of the state and not to the judicial decisions or acts of the state courts.

Central Land Co. vs. Laidley, 159 U. S. 103.
Bacon vs. Texas, 163 U. S. 207, 216.
Webber vs. Rogan, 188 U. S. 10.

The contract clause is not directed against all impairment of contract obligations but only against such as result from a subsequent exercise of the legislative power of the state. It does not reach mere errors committed by a state court in passing upon the validity and effect of a contract under the laws in existence when it was made. If there be no subsequent law, or if no effect be given to it by the state court this court cannot take jurisdiction no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired.

Cross Lake Shooting and Fishing Club vs. State of Louisiana, 224 U. S. 632.
McGovern vs. City of New York, 229 U. S. 363.
Fisher vs. City of New Orleans, 218 U. S. 438.

N. O. Water Works Co. vs. La., 185 U. S. 336, 350.

Turner vs. Wilke Co. Com., 173 U. S. 461.

Moore-Mansfield Construction Co. vs. Electrical Installation Co., 234 U. S. 619.

Cleveland & Pittsburgh R. R. Co. vs. Cleveland, 235 U. S. 50.

Ross vs. State of Oregon, 227 U. S. 150.

Where the sole question is whether the supreme court of the state has properly interpreted the contract and there is no question of subsequent legislative impairment there is no federal question to be answered.

Yazoo & Miss. R. Co. vs. Adams, 180 U. S. 41.

"The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid, it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party

to impair the obligation of the particular contract in question."

Lehigh Water Company vs. Easton, 121 U. S. 388.

NO FEDERAL QUESTION IS INVOLVED IN THIS CASE UNDER THE STREET RAILWAY'S CONTENTION THAT TO COMPEL THE STREET RAILWAY COMPANY TO PAY THE COST OF THE IMPROVEMENT WOULD BE TAKING FROM THE DEFENDANT, PROPERTY AND CONTRACT RIGHTS WITHOUT DUE PROCESS OF LAW.

The proposition here advanced by the street railway company is in effect that if a state court should make an erroneous decision in interpreting a contract, that the losing party is deprived of his property without due process of law.

This court has laid down the rule that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of a state court does not deprive the unsuccessful party of his property within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Central Land Co. vs. Laidley, 159 U. S. 103.
David etc. Co. vs. Los Angeles, 189 U. S. 207.
Seattle, Renton & So. Ry. Co. v. Linhoff, 231 U. S. 568.

In a proceeding in the nature of a *quo warranto* to obtain the forfeiture of a charter of a water works company for an alleged violation of the terms of the charter by the corporation, this court held that the determination of that question by the state courts in a proceeding to which the com-

pany was a party and after a full hearing had been accorded to it was due process of law and that no federal question arose from the decision of the court. The court said:

"The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the state, and that, therefore, the state has taken through her judiciary the property of the plaintiff in error without due process of law, is wholly without foundation. If it were otherwise, then any alleged error in the decision by a state court, in applying a state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained."

The court in the same case also said:

"The claim, therefore, that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to the defendant the equal protection of the laws, cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject matter, and its decision of the question was conclusive in this case so far as his court is concerned."

N. O. Water Works Co. vs. La., 185 U. S. 336.

In the case at bar, the railway company was made a party to the suit in the state courts in which judgment was rendered after the parties had been fully heard in the regular course of judicial proceedings and the mere claim by the street railway company that the state court's construction of the contract is erroneous does not under the foregoing decisions give jurisdiction to this court on the ground that the street railway company was deprived of its contract rights or that it was denied the equal protection of the laws.

NO SUBSEQUENT LEGISLATION IS GIVEN EFFECT BY THE DECISION OF THE STATE COURTS IN THIS CASE.

Both the trial court and the supreme court of the state based their decisions upon a construction of the franchise of 1892. The decision of the supreme court of the state is based upon two grounds, one upon a construction of the franchise of 1892, and the second ground being that the ordinance adopted June 11, 1910, requiring the street railway company to pave the railway zone upon University avenue was a reasonable regulation and which the city had a right to make under the provisions of the franchise and section 1862 of the Wisconsin statutes. Whatever may be said with respect to a federal question being involved in the second ground of the decision, it is plain that there is no federal question involved in the first ground of the supreme court's decision.

Furthermore the stipulation entered into between the city and the street railway company clearly shows that the city insisted that it was the duty of the street railway company under the

franchise of 1892 to pave the railway zone when the same was necessary and the city paved the remainder of the street.

The language of the stipulation upon this point is significant and is as follows:

"WHEREAS, the city of Madison insists that it is the duty of the railway company, under its franchise and the laws of Wisconsin, to grade, pave and otherwise to improve that portion of said avenue between its rails and one foot on the outside of each rail to correspond generally with the proposed improvement of the avenue and has heretofore ordered and directed the railway company, that it do such work as therein directed, and,

WHEREAS, the street railway company insists that such is not its duty and on demand by the city has refused and still refuses to do said portion of said work, except to grade."

It is evident that the dispute between the city and the street railway company was with reference to a proper construction of the franchise provisions of 1892, and especially with respect to the construction of the portion of section 3 of said franchise which required the street railway company to keep the railway zone in proper repair and in proper order and cleanliness.

It therefore appears that the record in this case presents a simple case of a dispute over the correct interpretation of a contract between parties both residents of the state and an interpretation of that contract by the state courts, and that the interpretation was made in a judicial proceeding

in which both parties to the contract were made parties.

It is therefore respectfully submitted that there is no question of impairment of the contract by subsequent legislation or failure to accord to the street railway company due process of law nor failure to accord to the street railway company the equal protection of the laws.

THIS COURT ACQUIRES NO JURISDICTION IN A CASE BROUGHT HERE FROM THE SUPREME COURT OF A STATE UNLESS THE DECISION BY THE STATE COURT IS GROUNDED UPON A FEDERAL QUESTION WHICH IS CONTROLLING IN THE DISPOSITION OF THE CASE.

The rule is well settled that in order to give this court jurisdiction of an appeal from the supreme court of a state, the latter court must have rested its decision upon a federal question which was controlling in the disposition of the case.

This court will not take jurisdiction where the judgment of the state court rests on two grounds, one of which does not involve a federal question or where it does not appear on which of the two grounds the judgment was based and the non-federal ground is sufficient to sustain the judgment.

Citizens' Bank vs. Board of Liquidation, 98 U. S. 140.

Jacks v. Helena, 115 U. S. 288.

Mich. ex rel. Atty. Gen. vs. Flint & P. M. R. Co., 152 U. S. 363

Mo. Pac. R. Co. vs. Fitzgerald, 160 U. S. 556.

Brooks vs. Mo., 124 U. S. 394.

Rutland R. Co. vs. Central Vermont R. Co., 159 U. S. 630.

Lowry vs. Silver City Gold & Silver Mining Co., 179 U. S. 196.

Hale vs. Lewis, 181 U. S. 473.

Allen vs. Arguimbau, 198 U. S. 149.

Pierce vs. Somerset Railway, 171 U. S. 641.

Harrison vs. Morton, 171 U. S. 38.

Wabash Railroad Co. v. Flannigan, 192 U. S. 29.

R. R. Co. vs. Rock, 4 Wall. 177.

Smith vs. Hunter, 7 How. 738.

The rule is stated thus:

"From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

Detroit City R. R. Co. vs. Guthard, 114 U. S. 133.

Again it has been held: "Although a federal question may have been raised in the state court, yet if the case was decided in that court on grounds not involving a federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction."

In this case it is held that this court cannot re-

view a construction which was given to an ordinance as a contract by the state court.

Henderson Bridge Co. vs. Henderson City, 141 U. S. 679.

It is submitted that no federal question arises under the second ground of the court's decision for the reason that the ordinance adopted by the city, June 11, 1910, requiring the street railway company to pave the railway zone was merely a regulation which the city had the right to make under the franchise of 1892 and was administrative and not legislative in character.

New Orleans vs. La. Sugar Co., 125 U. S. 18.

But even if a federal question were involved under the second ground of the decision, it is plain that the decision in the case would have been precisely the same if this second ground had not been mentioned by the court at all. It was not necessary to the decision. The court considered the decision an important one and deemed it best to support the decision by setting forth a second ground therefor, but expressly states that in so doing there is no intention of casting any doubts upon the soundness of the first ground of the decision.

It is therefore respectfully submitted that there is no jurisdictional question under section 237 of the Judicial Code. In order to sustain the jurisdiction of this court, it must appear that one of the questions mentioned in the statute was raised and presented to the state court; that it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered

in the case and that the decision was against the right claimed.

Murdock vs. Memphis, 20 Wall. 635.

It cannot be claimed that there was drawn in question, in the case at bar, the validity of a statute of or an authority exercised under the United States which the state court held invalid.

Telluride Power Co. vs. Rio Grande, etc., Ry. Co., 175 U. S. 639.

Nor was there drawn in question the validity of a statute or of an authority exercised under any state for the reason that there is no dispute between the parties as to the validity of the franchise of 1892, but merely a difference as to its proper interpretation.

The remaining ground of jurisdiction of this court set forth in the statute comprises cases where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up and claimed by either party, under such constitution, treaty, statute, commission or authority.

There is no right or title "specially set up and claimed" in the case at bar. The claim set forth in the answer is broad and general to the effect that to hold notwithstanding the express terms of the said franchise or contract that the defendant company should be compelled to pay the cost of said improvement referred to in said complaint would be to deny to the defendant equal protection of

the laws and Constitution of the United States and would be taking from the defendant property and contract rights without due process of law contrary to the provisions of the Constitution of the United States.

Under the following decisions it is submitted that under the foregoing language there is no right or title "specially set up and claimed."

Telluride Power Company vs. Rio Grande etc. Ry. Co., 175 U. S. 639.

Oxley Stave Co. vs. Butler Co., 166 U. S. 648.

It is therefore respectfully submitted that the writ of error should be dismissed.

WILLIAM RYAN,
Attorney for City of Madison,
Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. 653

SOUTHERN WISCONSIN RAILWAY COMPANY,

Plaintiff in Error,

versus

CITY OF MADISON,

Defendant in Error.

The Southern Wisconsin Railway Company above named as party to the above entitled action is hereby notified that the undersigned will, on Monday the_____day of_____, A. D. 1915, at the opening of court on that day, or as soon thereafter as counsel can be heard submit the foregoing motion and brief to the Supreme Court of the United States in its Court Room, at the Capitol, in the City of Washington, District of Columbia; a copy of which motion and brief thereon are hereby delivered to you.

WILLIAM RYAN,
Attorney for City of Madison,
Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the motion and brief thereon mentioned therein are hereby acknowledged this_____day of April, A. D. 1915.

_____,
Attorney for Southern Wisconsin Ry. Co.

THE facts, which involve the constitutionality of a street paving ordinance of the City of Madison, Wisconsin, under the contract clause of, and the due process provisions of the Fourteenth Amendment to, the Federal Constitution, are stated in the opinion.

Mr. Burr Jones, with whom *Mr. E. J. B. Schubring* was on the brief, for plaintiff in error:

A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 549, 555; *St. Paul Gas Co.* v. *St. Paul*, 181 U. S. 142, 148; *City Ry.* v. *Citizens Ry.*, 166 U. S. 557, 563; *New Orleans Water Works* v. *Louisiana*, 185 U. S. 336, 350; *Davis Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216; *Hamilton Gas Co.* v. *City*, 146 U. S. 258, 266; *Ross* v. *Oregon*, 227 U. S. 150, 162; *Cleveland* v. *Cleveland City Ry.*, 194 U. S. 517, 536; *Nor. Pac. Ry.* v. *Duluth*, 208 U. S. 583, 590; *Mercantile Trust Co.* v. *Columbus*, 203 U. S. 311, 320; *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 65, 81; *Southwest Light Co.* v. *Joplin*, 101 Fed. Rep. 23.

The passage of the ordinance of June 11, 1910, was such state legislation as impaired the obligation of the contract and raised a Federal question when properly presented in the record. Cases *supra* and see also *Houston & Tex. R. R.* v. *Texas*, 177 U. S. 66, 74, 77; *McCullough* v. *Virginia*, 172 U. S. 104, 117; *University* v. *People*, 99 U. S. 309, 313; *Water Co.* v. *Walla Walla*, 172 U. S. 1; *Mobile & Ohio R. R.* v. *Tennessee*, 153 U. S. 486, 495.

The state court by its decision gives effect to the ordinance. Cases *supra* and see *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116, 140; *Houston & Texas Central Ry. Co.* v. *Texas*, 177 U. S. 66, 74–77; *McCullough* v. *Virginia*, 172 U. S. 102, 116; *University* v. *People*, 99 U. S. 309, 320.

Mr. William Ryan for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the City of Madison to recover the cost of asphalt pavement between the rails of the defendant's track and one foot on the outside of them, for a certain distance along University Avenue in that City. The declaration, after stating the ordinances under which the defendant and its predecessors had built and operated the street railway concerned, sets out an ordinance of June 11, 1910, requiring the defendant, under a penalty, to do the work above described. The defendant answered that to make it pay the cost would deprive it of its property and contract rights under its franchise without due process of law and the equal protection of the laws, contrary to the Constitution of the United States. The judge before whom the case was tried found that the designated space had become so out of repair as to interfere with travel and that the crushed stone then used was not a proper pavement, and would interfere with the asphalt laid down by the City, and gave judgment for the plaintiff. The Supreme Court accepted the defendant's position, that its charter was a contract, but met the argument based upon it by a construction that warranted the later ordinance, and judgment for the plaintiff was affirmed. 156 Wisconsin, 352.

As our opinion is that the judgment should be affirmed, we shall not dwell upon a motion to dismiss made by the defendant in error. The court expressly upheld the later ordinance, and whether that ordinance can be upheld without impairing the obligation of the admitted contract of the charter is a Federal question none the less that the answer depends upon the construction of the instrument. Even if the opinion below be read as asserting that the duty existed by the charter alone irrespective of the later ordinance, still as the ordinance was set up and relied upon in the declaration and was present im-